TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1920

No. [redacted]188

PANAMA RAILROAD COMPANY, PLAINTIFF IN ERROR,

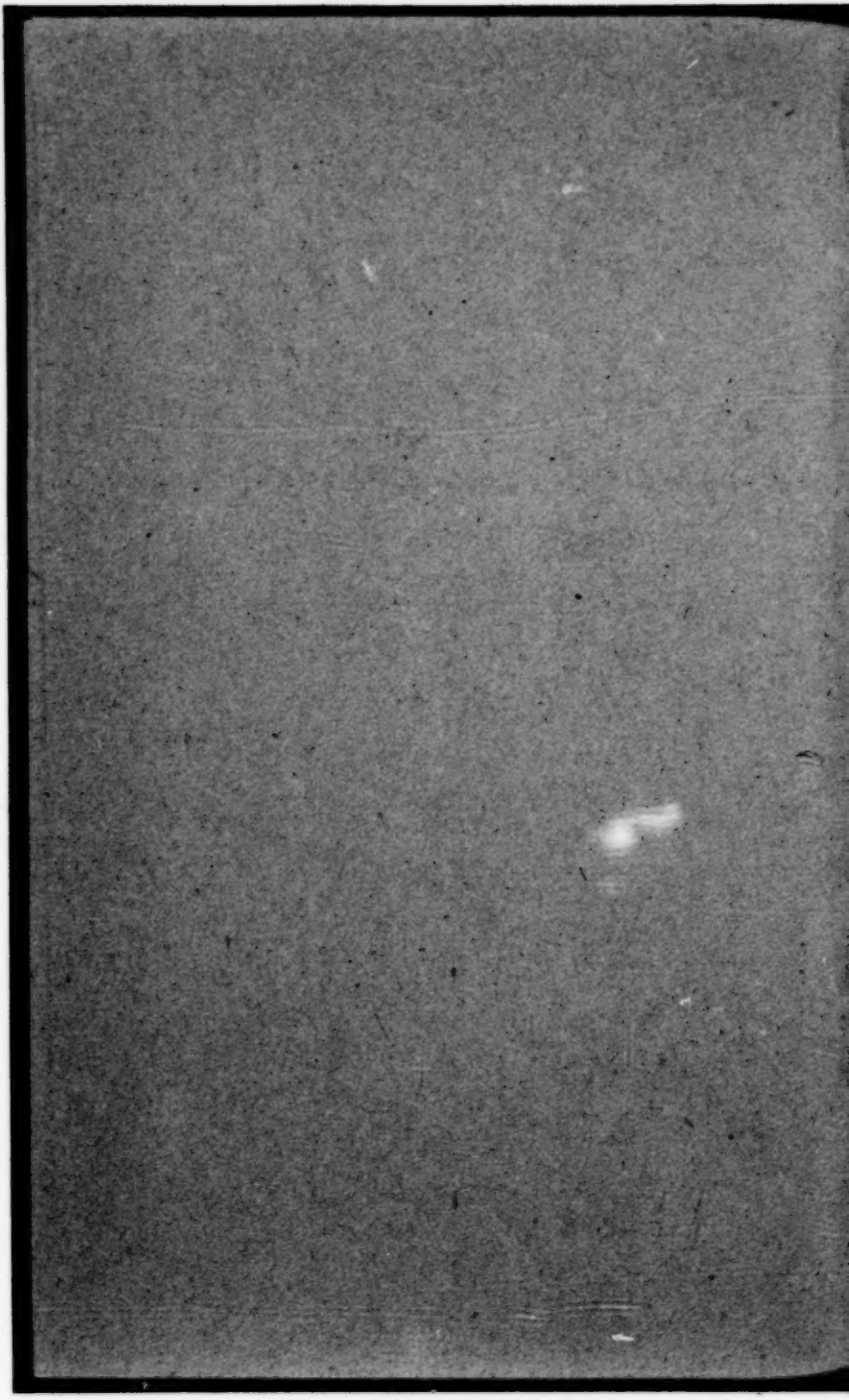
vs.

NOEL PIGOTT, A MINOR, BY HIS GUARDIAN *AD LITEM*, GEORGE MORRELL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED JUNE 30, 1920.

(27,189)



(27,180)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 425.

PANAMA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

NOEL PIGOTT, A MINOR, BY HIS GUARDIAN *AD LITEM*, GEORGE MORRELL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

INDEX.

	Page.
Caption	*a*
Record from the district court of the Canal Zone	*c*
Caption	1
Complaint	1
Answer	5
Motion of defendant for continuance	9
Exhibit "A"—Certificate of physician as to John Sharpe	12
Motion of defendant for directed verdict	12
Hearing and verdict for plaintiff	13
Motion of defendant for new trial	14
Judgment and order overruling motion for new trial	27
Order as to argument on motion for new trial	28
Supersedeas bond on writ of error	29
Bill of exceptions	31
Exception to order overruling motion for continuance	31
Evidence for plaintiff	32
Testimony of Thomas Piggott	32
Adina McCormack	36
Mrs. Thomas Piggott	38

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 11, 1919.

	Page.
Testimony of Henry Cook	39
Emily Kidd	41
John Lewis	43
Elias Aizpuru	44
Noel Piggott	50
Evidence for defendant	50
Testimony of Joseph Burgoon	50
S. W. Heald	52
A. L. Prather	56
E. J. Neville	58
Thomas J. Shirley	63
Harry Neal	65
Domingo Charres	66
John Sharpe	68
Dr. Pablo Arosomena	69
Evidence for Plaintiff	78
Exhibit "A"—Articles 3, 87, and 662 of Penal Code of Colombia	78
"B"—Commentaries of J. V. Concha on Penal Law of Colombia	79
"C"—Law 62 of 1887	81
"D"—Sentence of supreme court at Bogota	83
"E"—Extracts from decisions of supreme court of Colombia	84
Evidence for defendant	87
Exhibit "F"—Article 2347, Civil Code of Panama	87
"G"—Law 37 of May 4, 1904, of National Convention of Panama	88
"H"—Articles 1 to 5 of Law 62	88
"I"—Article 2349 of Civil Code of Panama	89
Motion of defendant for directed verdict, order overruling same and exception	90
Requests of defendant for special instructions Nos. 1, 2, 3, and 5, and exception to refusal thereof	90
Charge of the court	92
Exception to order overruling motion for new trial and judgment	100
Petition for writ of error and supersedeas	101
Assignment of errors	102
Order allowing writ of error	106
Stipulation as to Defendant's Exhibit A	107
Clerk's certificate	108
Argument and submission	109
Opinion of the court	109
Judgment	111
Petition for writ of error and order allowing same	111
Assignment of errors	113
Bond on writ of error	114
Clerk's certificate	115
Writ of error	116
Citation and service	117

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and Proceedings Had and Done at a Regular Term of the United States Circuit Court of Appeals for the Fifth Circuit, Begun on Thursday, November 21st, A. D. 1918, at New Orleans, Louisiana, before the Honorable Don A. Pardee, the Honorable Richard W. Walker, and the Honorable Robert L. Batts, Circuit Judges:

PANAMA RAILROAD COMPANY, Plaintiff in Error,

Versus

NOEL PIGOTT, a Minor, by His Guardian Ad Litem, GEORGE MORRELL, Defendant in Error.

Be it remembered, That heretofore, to wit, on the 4th day of September, A. D. 1918, a transcript of the record of the above styled cause, pursuant to a writ of error from the District Court of the Canal Zone, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 3291, as follows:

Transcript of Record.

United States Circuit Court of Appeals, Fifth Circuit.

No. 3291.

PANAMA RAILROAD COMPANY, Plaintiff in Error,

Versus

NOEL PIGOTT, a Minor, by His Guardian Ad Litem, GEORGE MORRELL, Defendant in Error.

Error to the District Court of the Canal Zone.

[Original Record Filed September 4, 1918.]

U. S. Circuit Court of Appeals. Filed Oct. 26, 1918. Frank H. Mortimer, Clerk.

UNITED STATES OF AMERICA, CANAL ZONE.

DISTRICT COURT OF THE CANAL ZONE, TO-WIT:

In the District Court of the Canal Zone for the Division of Cristobal, begun and held at the Court House, in the city of Cristobal, on the third Friday of February, being the fifteenth day of the same month, in the year of our Lord, 1918.

Present:

The Honorable William H. Jackson, District Judge of the Canal Zone, presiding;

Messrs. Valentine E. Bruno, Theodore C. Hinckley and Stevens Ganson, Attorneys for the Plaintiff;

Messrs. Frank Feuille and Walter F. Van Dame, Attorneys for the Defendant.

Among others were the following proceedings, to-wit:

COMPLAINT.

UNITED STATES OF AMERICA.

CANAL ZONE.

In the District Court of the Canal Zone, for the Division of Cristobal.

NOEL PIGOTT, A MINOR, BY HIS GUARDIAN, AD LITEM GEORGE MORRELL,

Plaintiff,

versus

Civil No. 174.

PANAMA RAILROAD COMPANY, A CORPORATION,

Defendant,

SECOND AMENDED COMPLAINT.

Comes now the plaintiff in the above entitled cause, the said plaintiff being a minor, seven years of age, by his guardian ad litem, George Morrell, and for his cause of action against the defendant states:

(1) That the above named plaintiff is an infant, seven years of age.

(2) That on the fourth day of December, 1917, at Ancon, Canal Zone, upon an application duly made on behalf of said minor plaintiff, the said George Morrell was duly and regularly appointed by the Judge of the District Court of the Canal Zone the guardian ad litem of and for the said plaintiff for the purpose of representing said minor plaintiff in this cause.

(3) That the defendant is a corporation, duly organized and operating under and by virtue of the laws of the State of New York, United States of America, and that at the time of the committing of the wrongs and
3 injuries hereinafter complained of, the said defendant was and still is operating a railroad, together with the necessary cars and locomotives thereof from the City of Colon, Republic of Panama, to the City of Panama, Republic of Panama, and that said line of railroad crosses the Canal Zone from the City of Cristobal, Canal Zone, to the town of Balboa, Canal Zone, the major portion of such line of railroad being and lying within the Canal Zone and within the jurisdiction of this Court.

(4) That a portion of the railroad line of the said defendant company runs between Seventh Street and Broadway in the city of Colon, Republic of Panama, both of which said streets are crowed throroughfares, upon which, during all hours of the day, large numbers of people are passing, and that, on the fourth day of December, 1916, the line of said railroad track was completely hidden from view by rows of hibiscus, planted by the defendant company on each side of said track for oramental purposes; that the said rows of hibiscus were approximately five feet eight inches in height on said fourth day of December, 1916, and that, by reason of the height thereof, children could not be seen by those operating trains on said track until they were directly upon the said tracks.

(5) That on said fourth day of December, 1916, the defendant company failed and omitted to maintain a signal man or to employ any means to warn pedestrians of the danger of passing trains which were crossing in and upon the crowded thoroughfares aforesaid.

(6) That on the said fourth day of December, 1916, while the above named Noel Pigott was lawfully upon the said street and was crossing the said railroad tracks, the defendant negligently and carelessly and with great force and violence, ran a freight car, propelled by a locomotive of the defendant company, in and upon the body of the said Noel Pigott, crushing his left leg above the knee, necessitating the amputation thereof, as a result of which the said Noel Pigott is now a cripple for life.

(7) That the servants and agents of the said defendant company failed to give any warning of the approach of said freight car and engine that injured the said Noel Pigott in the manner and form aforesaid, and that no bell was rung and no whistle was blown by the servants of the defendant who were operating the said train, irrespective of the fact that the place where the said freight car struck and ran over the said Noel Pigott was a public thoroughfare, and that at the time numbers of people were passing thereon.

4 (8) That the said injury to the said Noel Pigott was wholly due to the negligence and carelessness of the defendant, and that the said Noel Pigott did not in any manner contribute to the happening of said injury.

(9) That, as a result of the injury complained of, the said Noel Pigott was confined for two months in the Colon Hospital, and that his left leg was amputated above the knee; that his said injury is permanent and that he has suffered damage as a result of the negligence of the

defendant in the sum of fifty thousand dollars, ($50,000.00), United States Currency.

(10) That on said fourth day of December, 1916, there was in force and effect a law in the Republic of Panama, article 2341 of the Civil Code of the Republic of Panama, which said article is likewise in force and effect in the Canal Zone, said article reading as follows:

He who shall have been guilty of an offense or fault which has caused another damage, is obliged to repair it, without prejudice to the principal penalty which the law imposes for the fault or the offense committed.

(11) That the negligent acts of the defendant company hereinbefore complained constituted an offense or fault, and that the said Noel Pigott was damaged in the manner aforesaid by reason of the said offense or fault of the defendant company.

Wherefore, plaintiff prays judgment against the defendant company for the said sum of fifty thousand dollars, ($50,000.00) and for his proper costs herein expended.

HINCKLEY & GANSON,
Attorneys for Plaintiff.

Filed November 23, 1917, in the office of the Clerk of the District Court, Canal Zone.

W. B. CHEATHAM, Clerk.

ANSWER.

United States of America.

Canal Zone.

In the District Court of the Canal Zone for the Division of Cristobal.

Noel Pigott, a minor, by his guardian, ad litem, George, Morrell, Plaintiff,
vs. Civil No. 174
Panama Railroad Company, a corporation, Defendant.

5 Defendant's Answer.

Now comes the Panama Railroad Company, defendant in the above numbered and styled cause, by its attorneys, Frank Feuille and Walter F. Van Dame, and without waiving any of the exceptions or pleas heretofore urged by it in this case, and in all things reserving said exceptions and pleas, the defendant now answers herein, and specially answering the defendant denies that it is liable under the laws of the Republic of Panama for any of the alleged wrongs and injuries charged against this defendant in this cause;

And this defendant says that on the said fourth day of December, 1916, there was in force and in effect as the laws of the Republic of Panama the following articles of the Civil Code of Panama:

"Article 2341. He who has committed an offence or fault resulting in injury to another is obliged to indemnify him, without prejudice to the principal penalty that the law may impose for the fault or offense committed."

"Article 2343. He who caused the injury and his heirs are obliged to make indemnification."

"He who receives the benefit of the fraud (dolo) of another, without having had part in the fraud (dolo), is only obliged to indemnify to the extent of the value of the benefits he may have received from the fraud (dolo)."

"Article 2347. Every person is responsible, not only for his own actions, for the purpose of indemnifying the injary, but for the acts of those that are under his charge as well.

"So the father, and in the fault of the father, the mother is responsible for the acts of the minor children who inhabit the same house. So the tutor or curator is responsible for the conduct of the pupil who lives under his dependency and care.

"So the conductors of colleges and schools respond for the acts of pupils while these are under their care, and the artisans and empresarios (persons in charge of an enterprise), of the acts of apprentices and dependents (dependientes) in the same case.

"But the responsibility of such persons shall cease if, with the authority and care conferred upon and prescribed for them in their respective capacities they could not have prevented the act."

"Article 2349. The masters respond to the damage caused by their domestics and servants, done in the performance of service from the latter to the former; but they shall not be responsible if it shall be proven or if it appears that on such occasion the domestics or servants have comported themselves in an improper manner, that the masters had no means to foresee or impede the act by the use of ordinary care or competent authority; in this case all of the responsibility for the injury shall fall upon the said domestics and servants."

The defendant further says that on the fourth day of December, 1916, there were in force and in effect in the

Republic of Panama as special laws applicable to railroads, the following provisions of the police laws and regulations of the Republic of Panama:

6 "Article 488. When a tramway crosses a town, as well as when it passes by a gate or viaduct, it shall not go at a greater rate of speed than that of a wagon drawn by horses at a moderate trot; and in case of an infraction, the conductor, or the administrator of the enterprise subsidiarily, shall pay a fine of 10 to 100 pesos, without prejudice to the civil or penal responsibility to which he may be subject on account of the damage, fault, or offense."

"Article 489. The tramways, when they are required to pass by places where there is or may be a gathering of people shall from afar attract their attention by means of a whistle, a bell, a trumpet, or other adequate instrument. Any infraction of this provision shall be punished by a fine of 5 to 100 pesos; and if the omission occasions damage or prejudice to another, the procedure shall be in accordance with the preceding article.

"This article and the preceding one shall apply to railroads when they enter cities or towns."

That the foregoing quotations of the statutory law of Panama are substantial translations of the original Spanish text as the same appears in the said codes of the Republic of Panama;

That under the decisions and jurisprudence of the Republic of Panama, in the application of the provisions of the codes aforesaid, no responsibility rests upon the defendant herein to respond in damages to the plaintiff under the facts and circumstances alleged in the plaintiff's complaint;

That under the decisions and jurisprudence of the Republic of Panama, in the application of the provisions of the codes aforesaid, no damages can be recovered for phy-

sical and mental pain and suffering in an action based upon personal injuries; all of which this defendant is ready to verify;

And answering further the defendant says that it denies all and singular the allegations contained in plaintiff's complaint; and the defendant specially denies that the alleged injuries to the said minor, Noel Pigott, were the result of the negligence of the defendant or of its agents, servants, or employees, and the defendant here charges that the said injuries were the result of the negligence of the said minor, Noel Pigott.

The premises considered, the defendant prays that upon a hearing hereof, it have a judgment herein for its costs, etc.

FRANK FEUILLE,
WALTER F. VAN DAME,
Attorneys for the Panama Railroad,
Defendant.

Filed December 6, 1917, in the office of the Clerk of the District Court of the Canal Zone.

E. M. GOOLSBY,
Clerk.

7 MOTION FOR CONTINUANCE.

United States of America.

Canal Zone.

In the District Court of the Canal Zone, for the Division of Cristobal.

Noel Pigott, a Minor, by his Guardian, ad Litem, George Morrell, Plaintiff,

vs. Civil No. 174.

Panama Railroad Company, A Corporation, Defendant.

To the Honorable William H. Jackson, Judge of the District Court of the Canal Zone, sitting at the Cristobal Division:

Now comes the Panama Railroad Company, defendant herein, by its counsel, and respectfully represents to the Court that it cannot safely go to trial at this time for the following reasons, to-wit:

1. The cause of action instituted by plaintiff arose in the city of Colon, in the Republic of Panama, and in consequence the issues therein must be determined in conformity with the laws, rules and decisions of the Republic of Panama; that Frank Feuille, Esquire, the leading counsel for the defendant herein, who is familiar with the laws, rules and decisions of the Republic of Panama applicable to this case, and who has conducted the defense in all previous trials, is unable to attend the Court at this time, due to the fact that he is detained on the Pacific side, discharging the duties of Acting Governor of The Panama Canal, due to the illness of the Governor, Colonel Chester Harding, who is under the Doctor's treatment; and that the said leading counsel cannot absent himself from the Balboa Division wherein the seat of government of the Panama Canal is situated without inconvenience

to the public service of the Government; that it is expected that the Governor, Colonel Chester Harding, will have recovered sufficiently from his illness during the course of a week so as to permit him to return to his duties as Governor; that the Junior counsel in this case for the defendant has not had an opportunity to obtain the necessary acquaintance with the principles of Panaman law applicable to the case within the short period of time allowed to him since the inability of senior counsel to appear at the trial was ascertained.

2. Defendant cannot safely go to trial without the testimony of John Sharp, who resides in the city of Colon.

8 The said John Sharp is a material witness for the defense, and a wholly disinterested witness. Defendant expects to prove by the said John Sharp that he had been a locomotive engineer for the Panama Railroad in years past, and is thoroughly acquainted with the switch yard in which the accident herein complained of by plaintiff occurred; that he was present at the scene of the accident when it occurred; that he saw the plaintiff, Noel Pigott, coming from the Chinaman's shop at the corner opposite the track where the accident occurred, and that Noel Pigott was coming towards the track with his head down; that the engine was coming towards 9th St. at the time and was traveling very slowly; that the bell of the engine was ringing; that Noel Pigott came up to the middle of the crossing and stepped in the middle of the track in front of the box car as the car was approaching.

The defendant would respectfully represent to the Court that the said John Sharp is confined to his house suffering from physical injuries, and will be incapacitated for at least fourteen days, as is shown by the certificate of Dr. P. McD. Malliard, hereto attached and marked Exhibit "A"; that counsel for the defendant were not advised of the physical incapacity of the said witness John Sharp in time to obtain a commission to take his deposition in this case.

The defendant would respectfully represent that this application for postponement is not made for delay, but solely because the defendant cannot go safely to trial without the presence of its leading counsel, the said Frank Feuille, Esquire, and without the testimony of the said witness, John Sharp.

Defendant would further represent that the plaintiff and his guardian ad litem, and his witnesses all reside in the city of Colon, immediately contiguous to the Division of Cristobal, and that no injury would result to the plaintiff by a postponement of this case until some day in the March term of this Court at this Division.

The premises considered, defendant prays that this motion for a postponement be granted.

Respectfully,
FRANK FEUILLE,
WALTER F. VAN DAME,
Attorneys for the Panama Railroad, Defendant.

United States of America.

Canal Zone.

Before me, Nye B. Sherrit, a Notary Public, on this day personally appeared S. W. Heald, who upon being duly sworn by me, upon oath deposes and says that
9 he is the Superintendent of the Panama Railroad, defendant in the above-numbered and styled cause, and that the material facts set forth in the foregoing motion for postponement of the trial of the said cause are true.

S. W. HEALD.

Sworn to and subscribed before me this fourteenth day of February, 1918.

NYE B. SHERRIT,
(Seal) Notary Public in and for the Canal Zone.

EXHIBIT "A" ATTACHED TO THE FOREGOING MOTION FOR A CONTINUANCE.

Colon, R. P., February 13, 1918.

This is to certify that John Sharpe is under my professional care and confined to his room by my orders. His condition is such that he will be incapacitated for at least fourteen days.

P. McD. MILLIARD.

Filed February 14th, 1918, in the office of the Clerk of the District Court, Canal Zone.

W. B. CHEATHAM, Clerk.

MOTION FOR DIRECTED VERDICT.

United States of America.
Canal Zone.

In the District Court of the Canal Zone for the Division of Cristobal.

Noel Pigott, A Minor, by his Guardian ad Litem, George Morrell, Plaintiff,

vs. Civil No. 174.

Panama Railroad Company, a Corporation, Defendant.

Motion to Direct Verdict for Defendant.

Upon the termination of the evidence for the plaintiff and defendant, the defendant company, through its attorneys, asks the Court to instruct the jury to return a verdict in this case for the defendant for the following reasons:

10 1. Because the defendant company is not liable under the facts and the law of the Republic of Panama applicable to the case.

2. Because the facts do not show that the minor, Noel Pigott, was injured on account of the failure on the part of the defendant to observe any duty that it owed to the said minor.

3. Because the evidence shows that the said minor, Noel Pigott, was injured as the result of his own negligence and want of care.

4. Because the evidence in the case does not authorize the jury to find affirmatively that the said minor, Noel Pigott, was free from fault which contributed to the accident causing the injuries.

FRANK FEUILLE,
WALTER F. VAN DAME,
Attorneys for the Panama Railroad, Defendant.

Filed February 15, 1918, in the office of the Clerk of the District Court, Canal Zone.

W. B. CHEATHAM, Clerk.

MINUTES.

VERDICT.

And on the 15th day of February, 1918, the following proceedings are had in open Court:

Noel Pigott, by his Guardian ad Litem, George Morrell,
vs. Civil No. 174.
The Panama Railroad Co.

On this 15th day of February, 1918, this cause being called for trial and issues being joined and pursuant to summons issued come the jurors of a jury of good and

lawful men, to-wit: C. V. Vaughn, P. M. Brown, Sam Hutton, Walter A. Koerber, E. S. Guild, W. O. Baxter, B. R. Jett, W. H. Nellis, C. E. Thomas, W. D. Jones, Charles Lever and R. D. Hesse, who being duly elected, tried and sworn well and truly to try the issues joined herein after hearing all the evidence say: "We, the jury, on the issues joined herein, find for the plaintiff and assess his damages in the sum of $7,500.00, U. S. C." Whereupon the defendant herein in open Court gives notice of the filing of a motion for a new trial.

MOTION FOR NEW TRIAL.

United States of America, Canal Zone.

In the District Court of the Canal Zone for the Division of Cristobal.

Noel Pigott, A Minor, by his Guardian, ad Litem, George Morrell, Plaintiff,

vs. Civil No. 174.

Panama Railroad Company, A Corporation, Defendant.

11 Defendant's Motion for a New Trial.

Now comes the Panama Railroad Company, defendant in the above numbered and styled cause, by its attorneys, Frank Feuille and Walter F. Van Dame, and respectfully asks the Court to set aside the verdict of the jury, rendered in this cause on the fifteenth day of February, A. D. nineteen hundred and eighteen, and grant said defendant company a new trial for the following reasons:

1. The Court erred in overruling defendant company's general demurrer to the original complaint filed by Thomas Pigott and Noel Pigott in the herein cause, which demur-

rer was filed on June 28, 1917, and overruled on August 10, 1917, and to which ruling defendant then and there excepted.

2. A suit was originally instituted on the 18th day of May, 1917, in this Court by Thomas Pigott and Noel Pigott against this defendant for the alleged injury set forth in plaintiff's complaint herein, and thereafter, on the 19th day of November, 1917, the said plaintiffs, Thomas Pigott and Noel Pigott, were allowed to amend their said complaint over the objections of this defendant by substituting Nelson R. Johnson, guardian of the person and estate of the said minor, Noel Pigott, as the party plaintiff in this case, in lieu of the said Thomas Pigott, to which ruling of the Court this defendant then and there excepted.

And thereafter, with leave of the Court, the said Nelson R. Johnson, filed an amended complaint herein, styled "Noel Pigott, a minor, by his guardian, Nelson R. Johnson, plaintiff, vs. The Panama Railroad Company, a corporation, defendant."

3. The Court erred in overruling defendant's "plea to the jurisdiction for Want of Process," filed herein on the first day of December, 1917, in the said suit styled "Noel Pigott, a minor, by his guardian, Nelson R. Johnson, vs. the Panama Railroad Company," which plea was overruled by the Court on the first day of December, 1917, to which ruling of the Court the defendant then and there excepted.

4. The Court erred in overruling the defendant's "Plea in Abatement" filed on the first day of December, 1917, in the said suit styled "Noel Pigott, a minor, by his guardian, Nelson R. Johnson, vs. The Panama Railroad Company," which "Plea in Abatement" was based on the ground that the said Nelson R. Johnson was not the legal guardian of the person and the estate of the said Noel Pigott

and had not been duly appointed as such guar-
12 dian by a Court of competent jurisdiction, and said "Plea in Abatement" was overruled by the Court on the first day of December, 1917, to which ruling of the Court the defendant then and there excepted.

5. The Court erred in permitting the said Nelson R. Johnson, guardian as aforesaid, to amend his complaint herein on the fourth day of December, 1917, by substituting George Morrell as guardian ad litem for the said minor, Noel Pigott, in lieu of the said Nelson R. Johnson, guardian of the person and estate of said minor, which amendment was allowed by the Court over defendant's objections and to which ruling of the Court defendant then and there excepted.

And thereafter, the said George Morrell filed a complaint herein styled "Noel Pigott, a minor, by his guardian ad litem, George Morrell, vs. The Panama Railroad Company," wherein he sought to recover on behalf of the said minor damages for the alleged injuries complained of herein.

6. The Court erred in overruling the defendant's "Plea to the Jurisdiction for Want of Process," filed on the 6th day of December, 1917, in said suit of "Noel Pigott, a minor, by his guardian ad litem, George Morrell vs. The Panama Railroad Company," which plea was overruled by the Court on the 6th day of December, 1917, and to which ruling, the defendant then and there excepted.

7. The Court erred in overruling the defendant's "Plea in Abatement" filed on the 6th day of December, 1917, in the said suit of "Noel Pigott, a minor, by his guardian ad litem, George Morrell, vs. The Panama Railroad Company," wherein said Plea in Abatement was based on the ground that the said George Morrell was not the duly appointed guardian ad litem of said minor. The said Plea in Abatement was overruled by the Court on the 6th

day of December, 1917, and to which ruling the defendant then and there excepted.

8. The Court erred in overruling defendant company's written motion for a continuance, which motion, omitting caption, read as follows:

"Now comes the Panama Railroad, defendant herein, by its counsel and respectfully represents to the Court that it cannot safely go to trial at this time for the following reasons, to-wit:

"1. The cause of action instituted by plaintiff arose in the city of Colon, in the Republic of Panama, and in consequence the issue therein must be determined in conformity with the laws, rules and decisions of the Republic of Panama; that Frank Feuille, Esquire, the leading counsel for the defendant herein, who is familiar with the laws, rules and decisions of the Republic of Panama applicable to this case, and who has conducted the defense in all previous trials, is unable to attend the Court at this time, due to the fact that he is detained on the Pacific side, discharging the duties of Acting Governor of the Panama Canal, due to the illness of the Governor, Colonel Chester Harding, who is under the Doctor's treatment; and that the said leading counsel cannot absent himself from the Balboa Division wherein the seat of government of the Panama Canal is situated without inconvenience to the public service of the Government; that it is
13 expected that the Governor, Colonel Chester Harding, will have recovered sufficiently from his illness during the course of a week so as to permit him to return to his duties as Governor; that the Junior counsel in this case for the defendant, has not had an opportunity to obtain the necessary acquaintances with the principles of Panaman law applicable to the case within the short period of time allowed to him since the inability of senior counsel to appear at the trial was ascertained.

"2. Defendant cannot safely go to trial without the testimony of John Sharp, who resides in the city of Colon. The said John Sharp is a material witness for the defense, and a wholly disinterested witness. Defendant expects to prove by the said John Sharp that he has been a locomotive engineer for the Panama Railroad in years past, and is thoroughly acquainted with the switch yard in which the accident complained of occurred; that he saw the plaintiff, Noel Pigott coming from the Chinaman's shop at the corner opposite the track where the accident occurred, and that Noel Pigott was coming towards the track with his head down; that the engine was coming towards 9th St. at the time and was traveling very slowly; that the bell of the engine was ringing; that Noel Pigott came up to the middle of the crossing and stopped in the middle of the track in front of the box car as the car was approaching.

"The defendant would respectfully represent to the Court, that the said John Sharp is confined to his house suffering from physical injuries, and will be incapacitated for at least fourteen days, as is shown by the certificate of Dr. P. McD. Malliard, hereto attached and marked Exhibit "A"; that counsel for the defendant were not advised of the physical incapacity of the said witness, John Sharp, in time to obtain a commission to take his deposition in this case.

"Defendant would respectfully represent that this application for postponement is not made for delay, but solely because the defendant cannot safely go to trial without the presence of its leading counsel, the said Frank Feuille, Esquire, and without the testimony of the said witness, John Sharp.

"Defendant would further represent that the plaintiff and his guardian ad litem, and his witnesses all reside in the city of Colon, immediately contiguous to the Division of Cristobal, and that no injury would result to the plaintiff by a postponement of this case until some time in the March term of this Court at this Division.

"The premises considered, defendant prays that this motion for a postponement be granted."

and to which ruling the defendant then and there excepted.

9. The Court erred in overruling defendant's written motion requesting the Court to instruct the Jury to render a verdict in favor of the defendant, for the reasons set out in said motion, which omitting the caption read as follows:

"The defendant requests that the Court instruct the jury to render a verdict in favor of the defendant for the four following reasons:

"1. Because the defendant company is not liable under the facts and the law of the Republic of Panama applicable to the case.

"2. Because the facts do not show that the minor, Noel Pigott, was injured on account of the failure on the part of the defendant to observe any duty that it owed to the said minor.

"3. Because the evidence shows that the said minor, Noel Pigott, was injured as the result of his own negligence and want of care.

"4. Because the evidence in the case does not authorize the jury to find affirmatively that the said minor, Noel Pigott, was free from fault which contributed to
14 the accident causing his injuries."

and to which ruling of the Court the defendant then and there excepted.

10. The Court erred in refusing to give the jury defendant's request for instructions No. 1, which reads as follows:

"If you find from the evidence that Noel Pigott stepped on the track or ran into the box car after the emergency brakes had been applied by Engineer Neville, then, I instruct you that the accident was not the result of defendant's negligence, and your verdict must be for the defendant company."

and instead, charging the jury to the following effect:

"While that is perfectly good law, the Court leaves it to the jury as to whether or not the plaintiff used that care and caution that would be expected of a boy of his age,"

to which ruling and charge the defendant then and there excepted. The Court further charged the Jury on this point as follows:

"Now, Gentlemen, if you find that the railroad company was not negligent in any of these respects mentioned, in the manner of operating its trains, in its speed, in the ringing of the bell, and in the failure to maintain flagmen or gates at that point, then that settles your deliberations, and your verdict should be for the defendant. If you find that it has measured up to the standard of proper care and prudence in these respects, then your verdict should be for the defendant. If, however, you find that under the laws of the Republic of Panama a recovery is permitted under such circumstances, and if you find that the railroad was guilty of negligence in any one of the instances specified by the plaintiffs, and that the injury was the result of such failure of care or prudence, if any such you so find, then the next question for you to determine is 'was the boy, Noel Pigott, himself guilty of negligence' because the law is that notwithstanding the negligence of a defendant, it is not liable to respond to damages if the party himself was guilty of negligence which directly contributed thereto, so that the injury was the result of the joint concurring negli-

gence of the two together. Now, if you find that the defendant was guilty of negligence, then you are to consider 'Was the boy himself guilty of negligence, and did he fail to exercise that degree of care for his own protection that he should have at the time and place,' that ordinary care and prudence which is required of a person approaching a railroad crossing to exercise his own faculties, his own senses. It is generally expressed in the words 'Stop, Look, and Listen.' To stop, to look, and to listen for the approach of a train. And if by the exercise of these senses he could have seen the approach of the train and avoided the accident, the law does not permit a recovery, although you may find that the defendant was guilty of negligence in the manner of operating its trains, or in their failure to maintain gates or flagmen.

"Now, that is the general proposition, but there is another proposition that is just and fair that I should give you, and that is that the law does not require so high a standard of care and prudence on the part of an infant as it does of an adult. While the standard, as I have heretofore given to you, is that required of an adult, the law is much more lenient or tender in its demands in dealing with the infant. The law expects and knows that children of immature years are liable to act upon childish impulses and instincts, and therefore, the law says that in assuming whether or not an infant has been guilty of contributory negligence or not you are to fix in your mind what would be ordinarily required—what would be expected of a child of the age of the one injured; and if he measures up to the degree of care and prudence that you would ordinarily expect from one of his age and condition, then he is not guilty of contributory negligence, although it might be very negligent on the part of an adult. But if he failed to do, or if he does what ought not to be done by one of his age and injury results, then and in that event he is guilty of contributory negligence, and no recovery can be had, notwithstanding the defendant himself was guilty of negligence.

Now, that is the principle of law. So you are
15 to consider that this boy was some six or seven years of age. Fix in your minds what a boy of that age should be expected to do, how he should act, and then see if he failed in that respect. Something, in fact much, had been said about the fact that he was allowed to go on errands, and that being allowed to go on errands it was supposed that he was perfectly capable of taking care of himself. Now, as to whether he was guilty of negligence or not, you must consider the complicated evidence. Some say he was going along the street on the north side along the hibiscus hedge, and in such a way that he could not see the approach of the train, and on the other side there is much evidence to the effect that he was going along the south side and that a train coming from the north of the hibiscus hedge did not constitute any obstruction to the boy, and that he went deliberately caticornered or across into the danger. That is a fact for you to determine, whether he went along on the south side or the north side, and how did he act, and every fact and circumstance connected with it, and then say whether in attempting to cross he measured up to the standard as you as sensible men would fix in your mind for a child of his age."

This was error especially in view of the Court's refusal to give defendant's request for instructions No. 1.

11. The Court erred in refusing to give defendant's request for instructions No. 2, which read as follows:

"In the event that your verdict should be for the plaintiff, you are instructed that you are not authorized by the laws of the Republic of Panama to consider the physical and mental pain and suffering of the said minor, Noel Pigott, as an element in assessing damages, and your verdict, should you find one for the plaintiff, must be limited to the material damage suffered by said minor, Noel Pigott."

and in charging instead that:

"In considering the measure of damages they are:

"First. Physical and mental pain and suffering. That I charge you, is an element of damages. It is hard to put it in cold dollars and cents, but still it is an item, as the law allows, if you find for the plaintiff at all.

"Second. The next element is the diminution in his earning capacity which you may find he has suffered by reason of these injuries.

"These are the two elements. Any sympathy or pity—that does not enter into it at all. But the two elements are mental and physical pain and suffering and the diminution of his earning capacity, considering the probability of his life, considering what is figured as the average span of life, and what during the average span of life he might have earned, if you find for the plaintiff at all,"

and to which ruling and charge of the Court the defendant then and there excepted.

12. The Court erred in refusing to give defendant's request for instruction No. 3, which read as follows; and in stating to the jury instead:

"Gentlemen of the jury, you are instructed that the defendant company was not required by law to keep a flagman at the crossing where said minor, Noel Pigott, was injured; neither was the defendant required by law to maintain any gate or other warning device at that point; and the jury would not be authorized to base a verdict against the defendant solely on the ground of an omission to keep a flagman at the said crossing or to maintain a gate or other signal device there, if in every other respect the defendant had performed its duty."

and in stating to the jury instead:

"Gentlemen of the jury, while there appears to be no statutory or municipal law requiring them to maintain flagmen or gates there, it is a question for you to decide as to whether or not ordinary care or prudence in operating over the streets of a city would have required them to have maintained a flagman or gates at that place,"

to which ruling and charge of the Court the defendant then and there excepted.

The Court further charged the jury on this point, as follows:

"Now, coming to the other question: I think it is conceded in this case that there was no flagman or gates at that place to prevent accidents, and in that respect it would seem to me that that would be a duty, if it was a duty, which would rest with the company itself, instead of resting on any particular servant, agent, or employee. In other words, in that respect it hardly seems to me that the corporation could claim immunity on the grounds that that was the fault of some employees of the corporation in not having a watchman there; and in that respect I am of the opinion, if it was a duty at all on the part of the company, it was a duty that pertained to the company itself, instead of any particular officer, agent, or employee. Now, then, it is for you to decide, gentlemen, as to whether or not ordinary care and prudence would have required at that time and in that place, that gates or flagmen be maintained, in order to warn a party of the approach of danger. And where a corporation operates its trains through a city and over and across public streets and thoroughfares, it is required to use that ordinary care and prudence commensurate with or proportionate to the possibility of injury to the public, and in the event that it fails so to do, the railroad is liable. A railroad operating over the streets of a city is in a more

or less perilous business in regard to those who may be struck, and therefore, the degree of care and prudence is proportionate or commensurate with the possibility of the injury and the gravity of the injury that may result to the general public in the event of their failure so to do. Now, whether or not, at that time and at that place, ordinary care and prudence would have demanded of the railroad company the establishment and maintenance of gates or the keeping of a flagman there, is a question which I leave to you entirely. You ought to decide whether in your opinion that is the standard of ordinary care and prudence that should be observed by a railroad company, having in view the principle of law that they have no proprietary interests in the city, but are required to use proper care to the general public. If you find in that respect, according to your standard, according to your idea of care and prudence, that it was not necessary at that time and place to maintain gates or watchmen, then it would be your duty to find that the railroad company was not negligent in that respect."

This was error especially in view of the Court's refusal to give request No. 3.

13. The Court erred in refusing to give defendant's request for instructions No. 5, which read as follows:

"If the jury believe from the evidence that after Noel Pigott's danger was discovered by the train crew, the train crew exercised due care in an endeavor to avoid the accident, then the defendant would not be liable."

and instead stating to the jury as follows:

"So far as it goes it is all right, but that eliminates entirely another item of negligence claimed by the plaintiff, in that they were negligent in not maintaining a flagman or gates at that point; and for the reason that it does not embody all the elements of negligence relied upon by the plaintiff the instruction is refused."

to which ruling and charge of the Court the defendant then and there excepted.

14. The Court erred in charging the jury to the following effect:

17 "You have heard the laws of the Republic of Panama read to you. Article 2341 provides in substance that the empresarios shall be liable for the negligent acts of its servants and agents. You will consider all of this and then you will arrive at a settlement of this question as to whether or not under the laws of the Republic of Panama, a corporation is liable for the negligence of its servants, when proper care has been used in the selection of those servants."

for the reason that the Court's charge in this respect is not a correct statement of the Panaman law applicable to this case, in view of the fact that Article 2341 of the Civil Code provides that:

"He who shall have been guilty of an offense or fault, which has caused another damage, is obliged to repair it, without prejudice to the principal penalty which the law imposes for the fault or offence committed,"

and that Article 2347 of the Civil Code provides that:

"Every person is responsible, not only for his own actions, for the purpose of indemnifying the injury, but for the acts of those that are under his charge as well • • •

"So the conductors of schools and colleges respond for the acts of pupils while these are under their care, and the artisans and empresarios of the acts of apprentices and dependents (dependientes) in the same case,"

and that Article 2349 of the Civil Code reads as follows:

"The masters respond to the damage caused by their domestics and servants, done in the performance of service from the latter to the former, but they shall not be responsible if it shall be proven or if it appears that on such occasion the domestics or servants have comported themselves in an improper manner, that the master had no means to foresee or impede the act by the use of ordinary care or competent authority; in this case all the responsibility shall fall upon the said domestics and servants."

15. Because the verdict of the jury is contrary to the law and the evidence.

Wherefore, premises considered, defendant prays that the verdict be set aside and a new trial granted, in order that justice may be done.

Respectfully,
FRANK FEUILLE,
WALTER F. VAN DAME,
Attorneys for the Panama Railroad Company, Defendant.

Filed February 28th, 1918, in the office of the Clerk of the District Court, Canal Zone.
W. B. CHEATHAM, Clerk.

JUDGMENT.

And on the 13th day of April, 1918, the following proceedings are had in open Court:

Noel Pigott, et al.,
vs. Civil No. 174.
The Panama Railroad Co.

MINUTES.

On this 13th day of April, 1918, the parties to this action are in open Court at Ancon, by their attorneys, re-

spectively; and this case being called and heard
18 on the defendant's motion for a new trial, the said motion is overruled and the defendant's exception is noted and entered.

Therefore, it is considered by the Court that the plaintiff do have and recover of and from the defendant, The Panama Railroad Company, his said damages of Seven Thousand five hundred dollars by the jury assessed, together with interest on the same at the rate of six per cent. per annum from this date and costs and charges in this behalf expended and have execution therefor.

To which judgment the defendant by its attorneys enters its exception and is given two weeks within which to present its Bill of Exceptions for settlement. The bond to stay execution is fixed at $10,000.00.

A true copy.

W. B. CHEATHAM,
Assist. Clerk.

ORDER.

United States of America.

Canal Zone.

In the District Court of the Canal Zone for the Division of Cristobal.

Noel Pigott, a Minor, by his Guardian ad Litem, George Morrell, Plaintiff,
vs. Civil No. 174
Panama Railroad Company, a Corporation, Defendant.

Ordered, upon request of counsel for defendant, and with consent of counsel for plaintiff, that arguments on defendant company's motion for a new trial, heretofore

filed on February 27, 1918, during the current term of this Court, be submitted in the Court House at Ancon on March 27, 1918, at 9:00 A. M., or as soon thereafter as may be convenient, without prejudice to the defendant company's right of appeal on account of the fact that such arguments on said motion for a new trial were not heard by the Court within the current term.

W. H. JACKSON,
District Judge.

Filed February 28th, 1918, in the office of the Clerk of the District Court, Canal Zone.

W. B. CHEATHAM, Clerk.

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19 STAY BOND.

Filed April 22, 1918.

United States of America.
Canal Zone.

In the District Court of the Canal Zone, for the Division of Cristobal.

Noel Pigott, a Minor, by his Guardian ad Litem, George Morrell, Plaintiff,
vs. Civil No. 174.
Panama Railroad Company, a corporation, Defendant.

Bond on Writ of Error.

Whereas a judgment was rendered on the 13th day of April, 1918, in the above entitled and numbered cause in the said District Court of the Canal Zone for the Division of Cristobal, in the sum of Seven Thousand Five Hundred Dollars ($7,500.00) and all costs, in favor of the plaintiff, Noel Pigott, and against the defendant, The Panama

Railroad Company, and the Court having overruled the defendant company's motion for a new trial on the said 13th day of April, 1918, and the said defendant having been duly granted a review of said judgment by the United States Circuit Court of Appeals for the Fifth Circuit, by Writ of Error, and the defendant having been required to execute and file bond on said Writ of Error, in the sum of Ten Thousand Dollars ($10,000) United States Currency; in the terms of the law, in order that execution of said judgment might be stayed;

Now, therefore, the Panama Railroad Company, the defendant, as principal and I. L. Maduro, as surety, acknowledge themselves jointly and severally indebted to the said Noel Pigott, the plaintiff in said suit, in the full sum of Ten Thousand Dollars ($10,000) United States Currency, upon the condition that said defendant, The Panama Railroad Company, shall prosecute its said Writ of Error to effect and answer all damages and costs if it shall fail to make the plea good.

Witness our hands this 22nd day of April, 1918.

THE PANAMA RAILROAD COMPANY,
A Corporation, Defendant.

By W. F. FOSTER,
Its Acting Superintendent.

I. L. MADURO,
Surety.

Approved:

WM. H. JACKSON,
District Judge.

Filed April 29th, 1918, in the office of the Clerk of the District Court, Canal Zone.

W. B. CHEATHAM, Clerk.

20 STATEMENT OF FACTS AND BILL OF EXCEPTIONS.

United States of America.

Canal Zone.

In the District Court of the Canal Zone fo. the Division of Cristobal.

Noel Pigott, a minor, by his guardian ad litem, George Morrell, Plaintiff,

vs. Civil No. 174.

The Panama Railroad Company, a Corporation, Defendant.

Be it remembered that a session of the District Court of the Canal Zone for the Division of Cristobal, begun and held on the 15th day of February, 1917, the Honorable William H. Jackson, District Judge, presiding, the following proceedings were had:

A motion for a continuance was read and filed by Mr. Walter F. Van Dame, of counsel for the defendant company, based on the grounds that one of the defendant company's material witnesses, one John Sharp, was physically incapacitated and unable to attend the trial; and also on account of defendant company's leading counsel, Judge Frank Feuille, being unable to appear on behalf of the defendant company, due to the illness of Colonel Chester Harding, Governor of The Panama Canal, the said Judge Frank Feuille having been appointed acting governor during the said illness of the said Colonel Chester Harding. The said motion was overruled by the Court, to which rule the defendant company then and there saved an exception.

Thereafter, the plaintiff having announced ready for trial, and a jury of twelve men having been duly impaneled

and sworn, the plaintiff, in order to sustain the issues in his behalf, introduced the following witnesses.

THOMAS PIGOTT, the first witness for the plaintiff, testified as follows:

My name is Thomas Pigott. I live at 7th and Broadway in the city of Colon. I have lived on the Isthmus of Panama for a period of twelve years. I am not working at the present time, having been discharged from the service of the Panama Railroad Company after the last trial of this case. Prior to the time of my discharge I had been in the employ of the Panama Railroad Company for a period of ten years as a field timekeeper. At the time of my discharge my salary was $50.00 per month. I have three children; my wife is living, and Noel Pigott is my oldest child. He is now eight years old. At the time of his injury he lacked three weeks of being seven years of age. I was discharged from the service of the railroad company five days after I brought suit against the Panama Railroad Company. The case was tried on the 15th of December and I was notified that my services would terminate on the 17th of December, but on account of there being some uncompleted work I was kept in the service of the railroad company until the 20th of December, and was then given the regular service slip. The railroad company did not make any statement when they discharged me as to the reasons therefor, except that I was being discharged on account of reduction of force.

21 I recall the day upon which my son suffered his injury. It was on the 4th day of December, 1916. After coming from school he was sent by his mother to make some purchases at a Chinese shop between 4:00 and 5:00 o'clock. He had been gone about five minutes when I became cognizant of the fact that he had been injured. What first brought my attention to the fact that he was injured was the sound of a sharp whistle from an engine; and the mother came in shortly after she heard

the sharp blast of the whistle and wondered if it was him. As soon as she said that I put on an old suit of clothes and went down to see whether it was him or not. When I got there a crowd had gathered and I managed to get through the crowd to where he was. I saw him being supported by a Spanish man, and I saw that his leg was crushed. The conductor took a statement and he was lifted into the box car and taken to the Colon Hospital, where he remained for sixty-five days. His leg was amputated at the hospital. At the time he was put into the box car the lower part of his leg dropped off, and the remainder was amputated at the hospital. Three days after the accident I measured the height of the hibiscus hedge and found it to be five feet and 8 inches high. I do not know how tall my son was at that time, but he was smaller than he is now.

At this point in the witness's testimony a map was introduced and shown to the witness. Continuing his testimony, the witness stated:

This map fairly represents the way in which the hibiscus hedge ran, both with reference to the railroad track and the sidewalk that crosses the street. My house is marked "A" on the map. That Chinaman's shop to which my son had been sent on that day is marked "B". The accident occurred at about 4:30 in the afternoon The shaded portions on the map represent the hibiscus hedge running parallel to the railroad track, as well as the part of the hedge running parallel to the side-walks over the tracks. I measured the height of the hibiscus hedge at the place marked "Y". I do not know where my son was at the time or immediately prior to the time when he was struck, for the reason that I was not there. When I arrived at the scene of the accident he was lying on the sidewalk, four or five feet from the hibiscus hedge at the point marked "O" on the map. I didn't see the train until after it had stopped. It went in the direction of Cristobal after

the accident, and for that reason I knew in what direction it had come from. It was coming from north to south, from Colon to Cristobal. I was in my house at the time the train passed by. I heard no bell being rung nor any whistle being blown until after the accident had occurred.

Under cross-examination, the witness testified as follows:

I am the father of this boy (indicating Noel Pigott). I have brought two other suits against the Panama Railroad Company on behalf of this boy. The first suit for damages against the railroad company on behalf of Noel Pigott was tried on November 15, 1917. I testified in that case. At that time my attorney was Mr. V. E. Bruno, who is at present in Court. On that occasion I was suing for $25,000. On the 7th and 8th of December, 1917, a re-trial of the same suit was had, on which occasion my attorneys were Messrs. Hinckley & Ganson and Bruno. The amount of the demand in that instance was $50,000. It was $25,000 the first time. My attorneys on the occasion of this trial are Messrs. Hinckley & Ganson and Bruno, and the amount being sued for is $50,000. This is the third trial of this case. At the time my son sustained his injuries he was about two weeks less than seven years of age. He was a bright boy, and had been going to school for a period of about six months. The school which he attended was near my house. The point on the map marked "A" is where I lived, and the street upon which I lived is marked "E" street on the map. The other side of the street is called Broadway. The school which Noel attended was on Broadway, and in order to attend school during the six months referred to prior to his injuries he necessarily had to cross the railroad tracks. During that time also I felt at liberty to send him on errands, and he very frequently had occasion to cross the tracks. I regarded him as having sufficient intelligence to

take care of himself to go on short errands where we could see him. On the day of his injuries I sent him from the point on the map marked "A" to the point on the map marked "B". At the time I was working
22 nights. I had been out on some business, and had returned to my house and was going to take a rest so as to fit myself for work at 6:00 o'clock. I was in my pajamas. What caused me to know that Noel was hurt was the sound of the whistle. Then the mother came in and told me that she had sent him out, and stated that she was afraid he might have been hurt. I became alarmed, and putting on some clothes rushed down to the crossing where I saw him. What I first heard was the blast of the whistle. I was in my pajamas, but when I heard the whistle I immediately put on my clothes and went down there. I did not take time to put on any shoes, socks, or a shirt. I didn't see the train while it was in motion. I didn't state in my direct examination that the train did not whistle until after the boy was run over. I said that after the whistle was blown the mother came to me. I didn't state in my direct examination that I did not hear any bell or whistle. I said that I heard a sharp whistle and the mother came to me and drew my attention to it. I don't know when the whistle was blown, whether before or after the accident occurred. I presume it was after the accident occurred. At the time I measured the height of the hedge it was 5 feet 8½ inches high between the points "X" and "Y", shown on the map. That is what obscured the child's vision. I don't know how far from the hedge the boy was when he was struck, except that my recollection is that when I first saw him he was at the point marked "O" on the map. I do not know whether or not he had been moved from one point to another while I was putting on my clothes. I was discharged from the service of the railroad company on the 20th of December, 1917. When I went to work on the 17th of December, 1917, I was advised that my discharge would become effective on the 20th of December, 1917.

The cause of my discharge was "Reduction of force." Other members of the force were discharged at the end of the month. I was field timekeeper.

Under re-direct examination the witness testified as follows:

The corner of 7th and Broadway is a populous thoroughfare. There are many people passing over that crossing, and there are a great many children who play there, especially in the evening. By evening I mean around 4:00 o'clock.

Under re-cross examination, the witness testified as follows:

There are two streets back of (east) of "E" street. "F" street is merely an alley. Th e settled part of the city of Colon ends at "G" street. The populous portion of the town is in the direction of the depot (west). Through this section running north and south there are "Front Street, Bottle Alley, Bolivar, Cash, "D" Streets and Hudson Lane, making six streets, but there is only one alley and one street toward the east of "E" street.

ADINA MACCORMACK, the plaintiff's second witness, testified as follows:

My name is Adina MacCormack. I live at 7th and Broadway in the city of Colon. I have lived there four years, and was living there during the month of December, 1916. I was an eye-witness to the accident that occurred to this little boy. At the time I was in the Chinese shop immediately across from where I live. I live on the side known as "E" street. I went into the Chinese shop to make some purchases, and the little boy, Noel Pigott was in there. He left before I did. After he left, and while I was buying, I heard a great noise. I rushed out and I saw him in the act of putting his foot on the

railroad track, and the car came along and "bounced" him down. His ankle was taken off first, and in putting on the emergency brake the train slowed down, slacked, drew up, and took off the balance of the foot. I was a distance of about fifteen feet away (the map already referred to was at this time shown to the witness). I cannot indicate on the map just where I was standing at the time I saw the boy knocked down. I can give an idea of distance, but I am not educated enough to locate the points on the map. The accident happened about here and I was about there (Indicating distance of about fifteen feet). I remember the hibiscus hedge, and it was taller than the boy was at that time. He was a distance of about four feet from the hibiscus hedge at the time the car struck him. He was right up against the hibiscus hedge. He was walking along the sidewalk, looking steadfastly before him. Immediately after he was struck a crowd came and the car stopped. The car did not stop immediately, because they did not put the emergency brake on immediately. Then the emergency brake was put on and they stopped. The boy was thrown a distance of from here to there (indicating). The car did not stop immediately after striking him. When the car stopped his head was outside the rail and his foot was on the rail. Before the boy was struck I do not know whether I heard any bell rung, but I looked up on top of the car and I didn't see anyone there. After the child was run over I heard a lot of noise—bells and whistles. The train was made up of a box car being pushed ahead by an engine. The train did not make much noise, and it was not going very fast. The train was going from the Washington Hotel to Cristobal. (Indicating from north to south with hands). I didn't take any particular notice of the box car at the time the boy was struck, but I did notice that the box car was in front. I didn't see anyone on top of the box car. I don't know if he was coming down at the time or not, but I didn't see anyone. This crossing is a place where many people congregate. There are children to be seen there at all times.

23

Under cross examination the witness testified as follows:

I was in the Chinese shop at the time of the accident, and also while Noel Pigott was in there. What attracted my attention to the crossing was the noise I heard. The noise was like someone calling to people. At that time I ran to the door and saw him put his foot on the railroad track. I didn't leave the sidwalk, but stood at the Chinese shop. I do not know the distance from the Chinese shop to the crossing, but it was not such a distance as prevented me from seeing everything from where I stood. At that distance I could see the box car cut off the boy's foot at the ankle, and then back up and cut off his leg. When my attention was attracted to the railroad crossing by the shouting I do not know how many people there were at or near the crossing. I went out and saw two men "hollering" to the boy. They were standing at the crossing near the hibiscus hedge, and acting as though they were waiting for the train to pass. I didn't see any other boy besides Noel Pigott. When I went into the shop I saw people there, but just at that time I didn't see many people. After the accident I saw a great crowd. I didn't hear the train whistle while I was inside the shop. It was only when I saw the accident that I heard the bell ring and heard the whistle. The train was going slowly, because it always goes slowly when it runs on that street. At the time the boy was run down he was on the sidewalk, going toward the railroad track. He was not on the sidewalk nearest the Chinese shop, he was nearer to the railroad track.

MRS. THOMAS PIGOTT, the third witness called by the plaintiff, testified as follows:

My name is Mrs. Pigott. I am the mother of Noel Pigott. I recall the day of his injury. The reason that I sent him out was that I was in a hurry and wanted some-

thing quickly. I called him and told him to go over to the Chinese shop and told him to hurry. I was just out of the bath and had not finished dressing when I heard a sharp whistle and I said "Oh God! I wonder if it is Noel." I went out and said "Who is it that got mashed" and the next woman came back and said "It is Noel, his head is off." I did not care to see that and I ran back upstairs and someone told me that it was not his head but his foot. I don't know whether the whistle I heard was an emergency whistle or not. It was a sharp blast. I didn't hear a bell rung.

Under cross examination, the witness testified as follows:

The time I heard the whistle I was dressing. While I was dressing I heard a sharp whistle and jumped out and said "I wonder if it is Noel." I didn't see the train in motion, because I was inside the house. I didn't see Noel at all while he was lying at the crossing, because I heard that his neck was off, and I would not go.

HENRY COOK, the fourth witness called by the plaintiff, testified as follows:

24 My name is Henry Cook. I live at 7th and Cash Streets in Colon. I saw the accident which occurred to this little boy on December 4, 1916. I was working on the Lee Chong building, at the corner of 7th and Broadway, repairing the balcony upstairs. I saw the little boy go across the street. The engine was coming along with cars, and just as the boy was going to cross he was knocked down. The little boy was on the sidewalk, and the train was coming from the direction of the Washington Hotel. The little boy was on the sidewalk nearest the Washington Hotel, about three or four feet from the hibiscus hedge that flanks the sidewalk. The hedge was really taller than the little boy. It was between

four and five feet high at that time. I didn't notice the boy until just as he was crossing the track. The little boy was walking. I don't remember hearing a whistle or a bell. I saw no one on top of the box car. The box car was being pushed by the engine, and there was one other car behind the engine. The Panama Railroad Company has no flagman or switchman stationed at 7th and Broadway. There are no gates, such as there are in Cristobal. The train was going at a slow speed—not very fast.

Under cross examination, the witness testified as follows:

I cannot locate the Lee Chong building where I was at work, on this map. I was working as a carpenter and my attention was attracted to the crossing by a big noise made by some people. I got up and looked in that direction. When I saw the boy he was about to go onto the track, and I said to myself "Oh God! That little boy is going to get killed." At this time he was three or four feet from the rail. I did not go over to the crossing after the boy was struck. When the boy stepped onto the track he was on the sidewalk nearest the Washington Hotel. Of that I am sure. I remember that I testified in both of the other trials in this case. I do not know the points there, and I do not remember that I testified that the boy was on the sidewalk nearest Cristobal (South). I know where the Washington Hotel is, and he was on the side nearest the Washington Hotel. On the last two trials I testified that he was on the side farthest away from the Washington Hotel, but that was a mistake all the same.

Excerpts were read to the witness from his testimony at a former trial of this case, wherein he was asked the question: "When you saw this little boy was he on the sidewalk toward the Washington Hotel (North) or on the side toward Cristobal?" The witness's answer was: "On the side toward Cristobal when I saw him." Continuing the witness testified as follows:

I do not know why I change my story at this time. I know where the Washington Hotel is.

EMILY KIDD, the fifth witness called by the plaintiff, testified as follows:

My name is Emily Kidd. I live on Broadway between 6th and 7th Sts., Colon . I live upon the side of the street on which the American Theatre is located. I live downstairs in the same building in which Thomas Pigott lives. I have lived there about four years, and was there on December 4, 1916, at the time Noel Pigott was hurt. On Monday evening after I went out and came back I was sitting in the passage-way cooking some food, and I saw the train when it was coming, but I didn't hear any bell or whistle nor see anyone on top of the box car. When I looked there were two men sitting in the box car, swinging their feet this way (indicates). Then I heard a man bawl out and I looked and saw the box car "bounce" the child, but I didn't know whose child it was, and I said "Lord my God, his head is cut off" and when I turned back I saw a man, who I guess will soon come up, had a bandage and it was sufficient, and they took a big rope about the thickness of my finger. After a while the father came, and they put him in the box car and the foot dropped off, and they took him down to the Hospital. Before the car struck the boy I heard no bell or whistle, but I heard a great noise. They blew the whistle after the boy had been struck. There was no one on top of the box car. They were sitting in the box car with their feet swinging, looking at the theatre. During the time I have lived in this neighborhood I have not seen a flagman at 7th and Broadway, to warn pedestrians or passersby. There are no gates there. It is rather a populous place. There are many people there for it is a "crossing" street. There are plenty of children there, and the Broadway and America theatres are there also.

Under cross examination, the witness testified as follows:

The Chinese Theatre (Broadway Theatre) is not being used, and has not been used for a long time, except on special occasions. It was not in use on December 4, 1916. The theatres are open at night, and never in the afternoon except on Sunday afternoons. Trains very rarely are run on Broadway. I live in the same house as do the Pigotts, and my attention was attracted to the crossing by a great noise of people bawling. I threw down the food I was cooking and ran, and then the car "bounced" the boy down. The boy was on the sidewalk. I have no idea how many feet the Pigott house is from the crossing. I live downstairs in the front of the house, but at the time I was in the passage-way of the house sitting down. I do not understand maps. (The witness was shown a map, showing the location of the Pigott house marked "A", the railroad line, and the hibiscus hedge). The part of the crossing on which the Pigott boy was when he was struck was on the side toward the Washington Hotel. He was on the concrete sidewalk, and near the hibiscus hedge. The hedge was very high. It was higher than the boy was.

The following question was then asked the witness:

"Now we have the boy on the track near the hibiscus hedge on the side toward the Washington Hotel, and we have you on the lower floor of the Pigott house;—you being on the lower floor and the hibiscus hedge being very high, and the Pigott boy being near the hibiscus on the track, how was it possible for you to see the accident?"

The witness answered:

"Listen, I will tell you. The noise caused me to run out, and just as I came out I saw the train bounce him."

(Narrative of witness's testimony continued). I ran from the house toward 7th Street. The men who made the noise which attracted my attention were at the crossing. After I heard the shouts of these men I ran from my house to the railroad crossing. I had time to run from my house to the railroad crossing in time to get to see the boy get knocked down.

JOHN LEWIS, the sixth witness called by the plaintiff, testified as follows:

My name is John Lewis. At the time of the accident I lived at Cash and 7th Streets. I was at the crossing at the time this little boy was injured. I was standing up, and in standing I had a sight of the engine coming with a box car behind. I never had the privilege of seeing the child until something told me to cast my eye, and as the train passed I had a glimpse of him, and as I "glimpsed" him I yelled "Whoa." I was the man who pulled him away after he got mashed. I saw him get mashed, and I was in a white suit and I was all "messed up". I had a large white handkerchief and I used that, but it wasn't enough. It was no time at all from when I first saw him until the boy was struck, not even five seconds intervened. Just as I saw him I yelled. I yelled just before he was struck. When he was struck he was in the track. When I saw him he just barely glanced the bushes nearest the Washington Hotel. So far as I know he was walking. I don't know if the hibiscus was higher than he was—I only observed the box car. I don't know if the hibiscus has been trimmed since that time. The Panama Railroad Company has no flagman at that crossin, and they do not maintain a gate there.

26 Under cross examination, the witness testified as follows:

The train was passing very slowly. When I yelled the train stopped. When it stopped it had not cleared the crossing. After striking the boy the train stopped within a distance of five or six feet. I was the one that caused the train to stop, because of the great alarm I raised. I heard a whistle after the child was injured. I took out my handkerchief and it was not sufficient. Only a bare section of the leg remained. I heard the bell after the child was injured, that is after the child was injured and they were taking him to the hospital. They did not ring the bell until after the accident. There were other people standing at the crossing waiting for the train to pass "but to tell you whether the men was white or black, I don't know, but through the accident to that child I got so frightened to see the accident to the child. Second, to see how small he was to bear such pain, for when I held him so he were not making a noise, and I don't see no water. I was in blood. Immediately after picking him up they took him to the hospital."

MR. ELIAS AIZPURU, the seventh witness for the plaintiff, testified as follows: (Read from testimony given on previous trial, by agreement of counsel).

Direct Examination.

By Mr. Ganson:

Q. Will you please state your name?
A. Elias Aizpuru.
Q. You live in Panama?
A. In Colon.
Q. How long have you lived on the Isthmus of Panama?
A. Almost all my life.
Q. Your father is Don Rafael Aizpuru?
A. Yes, sir.
Q. Your profession is that of a lawyer?

A. Yes, sir. Attorney at Law.

Q. How long have you been a lawyer?

A. Well, I started to practice in 1902.

Q. You have been practicing then for about fifteen years?

A. Nearly that.

Q. Are you familiar with the legislation and with the decisions of the Courts of Columbia and Panama with reference to the liability of railroad companies in actions for damages?

A. The legislation and decisions given by the Supreme Court—not with the latest decisions of the Supreme Court but with the old decisions of Columbia.

Q. You are familiar also with the decisions of the Supreme Court of Panama?

A. Yes.

Q. The laws that were in force and effect in Columbia in 1904 still continued in force and effect in Panama in December, 1916, insofar as they have not been amended by subsequent legislation?

A. Yes, sir.

Q. Are you familiar with the laws of 1887, with reference to the liability of empresarios of railroad companies, which have been read in evidence here?

A. Yes.

Here the law 62 of 1887 of the Republic of Columbia was read in evidence, same appearing as Exhibit H of plaintiff).

Q. Was that the law of the Republic of Panama during the month of December, 1916?

A. Yes, sir.

Q. Will you please state to the jury whether or not under the law of Panama, if a railroad company runs a train over a track on its right-of-way that crosses a public street in the city of Colon, under circumstances such

27 as have been brought out by the evidence in this present case, the railroad under the laws of Panama would or would not be liable in damages to that boy for the injury?

A. I will ask you please to let me see the law, because I don't remember the article to which you refer.

Q. I mean the general law. Did you understand my question fully?

A. I understood it in accordance with the law of 1887. As far as the testimony is concerned I would like to express myself in Spanish.

(Mr. Ganson handed a book to the witness and said "That is the law.")

Mr. Aizpuru:

According to Article 5 of Law 62 of 1887, I consider that the empresario of the Railroad Company, or the management, is responsible for the damages caused by its employees in the exercise of their duties, always provided that such persons have been accepted as of good character prior thereto.

Q. Now, under the law of Columbia and the law of Panama in December, 1916, can damages be awarded for pain and suffering?

A. What kind of pain?

Q. Physical pain and mental pain?

A. Physical pain, yes.

Cross Examination.

By Judge Feuille:

Q. How long have you been practicing law?

A. Since 1902.

Q. Where did you learn your profession?

A. I learned it with Prof. Patterson, Dr. Obaldia, Dr. Filos, etc.

Q. Did you go to any law school?

A. No, sir.

Q. Are you acquainted with the police law of the railroads of Panama?

A. Yes, sir.

Q. Are you acquainted with that law (handing witness the Police Code).

A. Yes, sir.

Q. When was that promulgated?

A. 1904.

Q. It was re-enacted then by the Panama Assembly?

A. Yes, sir.

Q. Isn't it a fact that in 1909 the President of Panama again promulgated that same law?

A. Yes, sir.

Q. Isn't that the law of Panama to-day?

A. Not today, because we have a new codification.

Q. I mean on December 4, 1916.

A. Yes, sir.

Q. I want to have you read Articles 488 and 489 of the Police Code.

(Witness reads).

"Art. 488. When a tramway crosses a town, as well as when it passes by a gate or viaduct, it shall not go at a greater rate of speed than that of a wagon drawn by horses at a moderate trot; and in case of an infraction, the conductor, or the administrator of the enterprise, subsidiarily, shall pay a fine of 10 to 100 pesos, without prejudice to the civil or penal responsibility to which he may be subject on account of the damage, fault, or offense.

28 "Art. 498. The tramway, when passing places where there are or may be a gathering of persons, shall call their attention from afar and shall continue to call their attention by means of a whistle, bell, or horn. Every infraction of this provision shall be punished by a fine of 5 to 100 pesos, but if the omission shall occasion damage or prejudice to another, the procedure shall be in accordance with the preceding article.

"This article and the preceding one shall apply to railroads when they enter cities or towns."

Q. Who would be responsible for the violation of those two provisions—which is the responsible party?

A. In this case the conductor will be responsible, for he does not comply with the ordinances of the city.

Q. Are those the city ordinances or national ordinances?

A. These are the laws of the Republic of Panama.

Q. Who is responsible under those two provisions under the law of Panama?

A. The responsibility by the police law is fixed on the conductor or "empresario."

Q. Does it say "Empresario"? I want you to say whether that says "Empresario" or "Administrator."

A. But this "Administrator" means the same in Spanish as "empresario." This law is for effect in police Courts. It is not for the Superior Court. It is only for the police department, for the Alcalde and those Courts. The punishment imposed is for so many days and is passed from one Court to another. So if the punishment is for two days it is taken to the Alcalde's Office. After that it is taken to the Municipal Court.

Q. That is the penal. What does it say about civil liability—who was responsible civilly?

(Mr. Ganson):

He says administrator or the conductor.

Q, Was civilly responsible under this law?

(Mr. Ganson):

That is what he says, yes.

Q. Then why do you say the Panama Railroad would be responsible in this particular case where they are charging the agents of the railroad with negligence?

A. Because we have a decision of the Supreme Court.

Q. Under this police law?

A. Under the Civil Code.

Q. But have you any decision of Columbia under this police law—any decision of the Supreme Court of Columbia?

A. No, sir.

Q. Why?

A. It does not come under their jurisdiction.

Q. This law is in force in Panama?

A. Yes, sir.

Q. How about the civil provisions?

A. They have the force and as much of the quantity as they desire.

Q. But who is civilly responsible, the conductor or the administrator?

A. Certainly, it says so.

Q. Isn't that the law of Panama?

29 A. Yes, sir.

Q. Can you tell the Court and the jury of a single decision of the superior Court of Panama allowing damages for physical pain and suffering—can you name one?

A. No, sir.

Q. In Columbia?

A. No, sir.

Q. Then you are simply stating your opinion?

A. Not against the Panama Railroad.

Q. Any other case—can you mention a single decision?

A. I don't remember just now any against a corporation.

Re-Direct Examination.

By Mr. Ganson:

Q. Are you familiar with the decisions of the Court of Cassation of France with reference to damage suits?

(Objected to by Judge Feuille. Objection overruled).

A. No, I am not familiar with it.

Q. Do you know whether Article 82 of the French Code is identical with the Code of Panama?

A. Yes, sir.

Q. Are you familiar with the works of Bandry-Laconterie?

(Objected to by Judge Feuille. Objection sustained).

NOEL PIGOTT, the eighth witness called by the plaintiff, testified as follows:

My name is Noel Pigott. I am eight years old. I was seven years old at the time the car struck me. I do not remember the time when the train came along and struck me. (At this point the stump of Noel Pigott's leg was exhibited to the Jury).

Here the plaintiff rested.

To sustain the issues in its behalf, the defendant company adduced the following testimony:

JOSEPH BURGOON, the first witness called by the defendant, testified as follows:

My name is Joseph Burgoon. I am employed in my father's jewelry store in Colon. On December 4, 1916, I was going along Broadway in the direction of the Washington Hotel in a coach. I saw a train coming along at a slow rate of speed—about five or six miles per hour. I heard a commotion and stopped the coach and looked around to see what it was. I saw that this boy had been struck by the train, and saw the conductor, Mr. Shirley, pick him up. I did not see the boy at the time he was struck. I did not see the accident. I saw the engine before it hit the boy. It was traveling slowly. I pass

7th and Broadway two or three times a day, because I live in that neghborhood. During the time I have lived in that vicinity I judge that the hibiscus hedge has been maintained at a heighth between 3½ and 4 feet. When the train stopped the head end of the box car was almost over the crossing. It had not wholly cleared the crossing. It was within the width of the street between the two sidewalks. I didn't know at what moment the brakes were applied. I couldn't swear that I heard a bell ringing at the time the train passed me. I didn't hear any whistles. At the time Mr. Shirley picked the boy up from the ground he was lying a little past the center of the road (indicating the point on the map by a small square). That place is nearest the edge of the sidewalk toward Cristobal. I do not know how many feet from the edge of the sidewalk he was lying, but he was beyond the middle of the street toward Cristobal.

Under cross examination the witness testified as follows:

The point indicated as the one in which Noel Pigott was lying was the position in which he lay after he had been struck, and after the train had stopped. I didn't see him struck. I didn't measure the hibiscus hedge. It was about the same heighth as the boy. I didn't notice a bell or whistle. I have never seen a flagman at the crossing of 7th St. and Broadway. It is not a populous crossing.

Under re-direct examination, the witness testified as follows:

I have lived in the neighborhood of 7th and Broadway for five or six years. At the time of the accident I lived on 5th Street, which is very near the place of the accident. The Broadway threatre has not been in use for about two years, and the American theatre is only used evenings. During the day time, when those theatres

are not in use, that crossing is not used very much. There is no comparison between the crossing at 7th Street and Broadway and the crossings leading from Colon into Cristobal, nor is there any comparison between it and the crossing at the Police Station in Cristobal. I have never seen any flagman or gates anywhere along Broadway. They do very little switching along Broadway after 4:00 or 5:00 o'clock in the afternoon and on holidays. I do not believe I ever saw any being done. On this particular occasion the train was moving very slowly, I should say at the rate of four or five miles per hour. I didn't notice any great crowd of people waiting at the crossing.

MR. S. W. HEALD, the second witness for the defendant, testified as follows:

I am the Superintendent of the Panama Railroad, and have held that position for the past two years. I have been in the service of the railroad company for about eleven years. (At this point the attorneys for the plaintiff admitted the qualifications of the witness as an expert railroad man). The tracks paralleling Front Street and the one on Broadway are within the Panama Railroad yard limits, and the grounds traversed by these tracks are the property of the Panama Railroad. There is very little switching done on Broadway. These tracks are very seldom used after regular working hours, and they are only used on Sundays and Holidays in exceptional cases. The necessity for a railroad track on Broadway arises from the location of the different warehouses and lumber yards, and the gas and water works at the other end of the street. There are no warehouses at 7th and Broadway. The gas company and the Electric Light Company lie beyond Seventh Street, in the direction toward the beach. In handling trains within yard limits it is not unusual or irregular or against rules to place a box car ahead of an engine. Under certain circumstances it is regarded as good railroading to do that.

Within yard limits the rules require that a man be stationed on the top of the front car, and another one on the hind car. The engineer and fireman would be in their respective places. On a train running from the Washington Hotel toward Mount Hope, the engineer would be on the right hand side of the engine. A member of the crew would be stationed on about the center of the box car, for the reason that if he stood near the edge he might be thrown off when the car is stopped or the air applied. About the center of the car is the proper place. On the day following the accident to this little boy I made an ocular inspection of the scene of the accident. I measured the heighth of the hedge in this vicinity, and found it to be 3 feet 8 inches to 3 ft. eleven inches tall. At none of the places near the crossing was the hedge higher than three feet eleven inches. The hedge had not been trimmed between the time of the accident and the time of my taking measurements. I measured the hedge carefully with a tape line. There is no comparison whatever between the crossing at 7th and Broadway and the crossing at the Cristobal fire station or the Cristobal police station as to the amount of traffic which crosses over those crossings. The crossings at the Cristobal fire station and the Cristobal police station are crossings over both main tracks and switch tracks. At those points there are two main line tracks and two switch tracks. Both crossings are virtually in the heart of town. I
31 wouldn't consider any crossing on Broadway near the heart of town. There is only one track on Broadway, with the exception of some spurs leading to warehouses along that street. There is no such spur at 7th and Broadway, but only one track.

Under cross examination, the witness testified as follows:

That he had no idea of the exact number of people living on the other side of Broadway (E. 8t.). When asked whether there were more than 5,000 or 6,000 the witness

replied: "I doubt if there are that many, but I would hesitate to say, because I have never heard that or never paid any attention to it; but judging from the number of buildings there I should say there were not that many." (Narrative statement of witness continued). All of the people living on that side of town have to cross Broadway in going into Colon, and have to cross the Panama Railroad track on Broadway. I cannot say how many people have to cross the railroad track, but I would not consider it necessary to maintain a flagman at any of those crossings. The proper place for a brakeman on a box car while it is being pushed is about one-third or one-half of the length of the box car from the front end, on account of the danger of being "jerked off." There is nothing for a man on top of a box car to hold on to except the brake wheel. There are a ladder and grab irons along the front of each box car. A man could hang on to the ladder, but it would not be good for him to do so. He would be safe if he sat on the front of the car and held on to the rungs of the ladder, but if he were seated on the front of the car with his feet hanging over the brakeman would not be able to give signals to the engineer as quickly as if he were standing on top of the car.

At this point in the witness's testimony there was read to him Rule 102, Panama Railroad Rules, which reads as follows:

"When cars are being pushed by an engine (except when shifting and making up trains in yards), a brakeman must take a conspicuous position on the front end of the leading car."

The witness, continuing testified:

That the trainman must stand on the front end of the leading car in such a position as to be able to see everything and to see the engineer. The rule says "the front end of the leading car." In this instance there was only

one car. If that engine had had more than one car the trainman would be on the front of the leading car. The trainman's proper position would be from one-half to one-third of the length of the car from the front end, which is in conformity with the rule. I do not consider "on the front of the car" to mean about the middle of it. I said that the practice always has been that a man would stand from ten feet to one-third of the way back. He can see ahead and he can get a signal to the engineer. If he sat close to the front end or close to the side of the car he might be "jerked off" when the air was applied, and if he would sit down he could hold on but he could not get a signal to the engineer.

Under re-direct examination, the witness testified:

That the train in question was being shifted within yard limits. The train was running along the railroad track on Broadway, and was within yard limits. On the date of the accident I had in my organization an engineer named E. J. Neville, a conductor named T. J. Shirley, a fireman named Harry Neal, and a brakeman named Domingo Charres. Mr. Neville was a first class man. He was very careful in operating engines, and to my knowledge never received a reprimand nor was he ever responsible for any wrecks. If he had done anything serious I would have known of it. Mr. Shirley is a very good man. He is still in the service of the railroad. The colored man, Harry Neal, has been in the service of the railroad eight or nine years, and is still in the service. His reputation is as good as that of anyone. Flagman Charres is as good as any of them. Charres, Neal and Shirley are still in the service of the railroad. Mr. Neville is no longer in the service of the railroad. He was discharged on account of reduction of force,
32 and not on account of a mis-management of any train.

MR. A. L. PRATHER, the third witness called by the defendant, testified as follows:

My name is A. L. Prather, and I am employed as a civil engineer of the Panama Railroad Company. (At this point the attorneys for the plaintiff admitted that Mr. Prather was a competent and able engineer. Thereupon the map herein referred to was handed to the witness). I made this map on the 4th of December, 1917. It was made as an exhibit at the trial of this case. It portrays the ground lay-out around the section shown, that is 7th Street and Broadway, showing also the Panama Railroad yards and E Street and Broadway. From the inner curb of Broadway to the tracks there is a grass plot, as well as from the inner curb of "E" Street to the track. The shaded portions shown on the map indicate a hibiscus hedge. The parallel lines indicate the rails of the track. The distance from the outer edge of the sidewalk on Broadway to the inner curb on Broadway is 23 feet, and the distance from the sidewalk on Broadway to the center of the track is sixty feet. The sidewalk along the front of the Chinese shop marked "B" is fifteen feet wide. A person standing at the door of the Chinese shop would be from 75 to 90 feet from the railroad crossing. A person standing on the edge of the sidwalk in front of the Chinese shop would be between seventy and seventy-five feet from the tracks running over the crossing. The house in which the Pigotts lived, as well as one of the other witnesses for the plaintiff, marked "A" on the map, is about 165 feet from the scene of the accident. This is the distance in following the line of the street. The diagonal distance would be decreased a little bit. I have made an ocular inspection of the neighborhood, and have taken an exact count of the people on the east side of Broadway and "E" Street between 6th and 8th Streets and for the four blocks adjoining, and found that there were from 1200 to 1300 people living in the square between 6th and 8th Streets and between "E" and "G" streets. The blocks on the other side of Broadway are about one-half of the

area of those in the square mentioned. The smaller blocks represent the old lay-out of Colon, and the square I have mentioned represents the new lay-out. There were about four times the number of people on the west side of Broadway as there were in about one-fourth the same area on the east side of Broadway. That would mean a square foot population of about one in eight, that is, eight times as many people living on the west side of Broadway as there are on the east side of Broadway. There are no other tracks except the single track indicated on the map at 7th and Broadway. I measured the heighth of the hibiscus hedge at the time this map was made. I found the extreme heighth of the hedge about four feet ten inches, between 6th and 7th Streets and half way between Seventh and Eighth Streets. The heighth of the hedge at the crossing at 7th Street averaged from 4½ feet to 4 feet 10 inches. I conducted experiments as to the distance which a person of the approximate height of this boy could see a train approaching from the direction of the Washington Hotel, if standing at various points along the crossing at 7th and Broadway. During the experiment an engine and a box car were placed in exactly the positions they were supposed to have been in on the day of the accident. The first position we took was a point on the center of the north sidewalk, and a point 7½ feet from the center line of the track. I got down with my eye three feet above the ground and the top of the box with a man on it could be seen at a distance of 100 feet back from my point of observation, i. e., a distance of 100 feet from the crossing. In the center of the street, 7½ feet back from the center line of the track a box car could be seen 225 feet, i. e., a little bit over two-thirds of the length of the block. With the eye at a distance of seven feet from the center line of the railroad and three feet from the ground, I could see a distance of 340 feet or the full length of the track on Broadway toward the Washington Hotel. If the hibiscus hedge had been three or four feet high on the day of the accident, as has been testified by Mr. Burgoon, the dis-

tance at which the box car could have been seen would have been increased fifty per cent. Your object would be three feet high, and in looking over a three foot hedge you could see fifty per cent further.

On cross examination, the witness testified as follows:

I took that position and squinted down the track solely for the purpose of finding out how far down the track I could see. That was my only object. Supposing I were stationed at a height three feet from the ground right up against the hedge, I could not have seen any distance at all. If I would have been one foot from the hedge I could have seen only a very little distance. The practical distance would be zero. The person's range of vision would depend entirely on the distance he was back from the hedge. If one moves back 100 feet, the range of vision would be indefinite.

33

Upon re-cross examination, the witness testified as follows:

If I had stood seventy-five feet from the Pigott boy at the time he was run over I would have been unable to go upon the witness stand and swear that I saw the car cut off his ankle, and then back up and cut off his leg, and that would be especially true if I had stood in the door of the Chinese Shop (marked "B").

E. J. NEVILLE, the fourth witness called by the defendant, testified as follows:

My name is E. J. Neville. I am now employed at the fuel oil handling plant at Balboa. I have been employed there since April or May of last year. Prior to that time I was employed as locomotive engineer by the Panama Railroad Company. I worked as a locomotive engineer on

the Isthmus for a period of about ten years. (At this point the attorneys for the plaintiffs admitted that Mr. Neville was a competent locomotive engineer—that there was none better on the Isthmus). I had twenty or twenty-five years of railroad experience prior to coming to the Isthmus. I was the engineer of the train which ran down Noel Pigott on the corner of 7th and Broadway. I remember the circumstances and details of this accident. We had been at the north end of Broadway doing some work there. In the course of our work we had picked up two cars. We had one car ahead and one behind the engine, and were going down Broadway toward Cristobal yard. When approaching this street where the accident occurred—in fact the front car had already entered the boundaries of the street—I got a violent signal from the conductor to stop, and at practically the same time that I got the signal I saw this little boy—a little black boy—running toward the track. It looked to me from where I sat that he was running in about the same direction in which we were going, but at an angle of about 45 degrees to the track. (The witness was here shown the map which has already been referred to). I know this whole street as Broadway. I never knew the distinction until this trial came up. E. Street, I understand, is on the left hand side of Broadway is on your right in going from the Washington Hotel to Mount Hope. At the time I first saw the boy he was running in a direction like this (indicates) diagonally to the course in which we were going and in the same direction, and as my recollection goes, the boy disappeared from my view in front of the car just as we were coming to a stop. I had already applied the brakes, and I don't know, or I didn't know at that time, whether the boy had escaped or not. It was all done in a second's time. The next time I saw the boy he was attempting to crawl out from under the car, and as he got part way out he seemed to catch on something. My conductor was riding on the front end of the engine, and immediately on giving me this signal he leaped from the footboard in the direction of the front of the engine,

and the conductor picked him up and pulled him out from under the car. I didn't get off the engine, as I saw the crowd had gathered around me, and I saw the conductor tie the boy's leg up, so I knew he was in good hands. After a minute or two,—it seemed to me a long time—they allowed us to put him into the box car and take him to the hospital. The point where we ran over the boy was on the Cristobal side of the crossing. It is my recollection that the front end of my engine was very near the intersection of the sidewalk. I would not say the intersection, but very near the edge of the sidewalk, the whole car being on the crossing. After I applied the brake I don't think the train traveled over six or eight feet. I was running very slowly, I should say about four or five miles an hour—about as slow as I could go and move at all. I always handle the engine that way through that section. The bell was ringing continuously while the engine was in motion. That was one of the conditions that I always insisted on, that the fireman keep the bell ringing while moving along those streets. I do not remember
34 my fireman's name, except that I heard it mentioned here in Court as Neal, but I know his face. My Conductor was Mr. T. J Shirley, my brakeman was Domingo Charres. The other brakeman was named Brown. I was on the right hand side of the engine in coming from the direction of the Washington Hotel. Mr. Shirley was on the footboard of the engine—the front footboard—on the right hand side, looking ahead. Brakeman Domingo Charres was on top of the box car ahead of the engine, and the other brakeman was behind. I am sure that Domingo Charres was in front of the engine on the box car. I saw him there. I didn't get a signal from Domingo Charres. The signal I got from the conductor detracted my attention from the man on the box car. I applied the brake before I hit the boy. I had no particular occasion to notice the heighth of the hedge along Broadway in running up and down that street, but I have noticed it several times and have a mental picture of it. I should say that the general heighth of the hedge

would average from three to four feet. It might run a little over three feet at times when it had not been trimmed for some time. At the time this boy was injured I do not think the hedge was higher than usual. The reason I make that statement is that I have had occasion to step to the gangway of the engine to get off the engine and down onto the ground, and in that way I noted the heighth of the hedge. I had no object in doing it, but I should say it would average the heighth of the gangway of the engine from the ground, which I should say would be in the neighborhood of three feet. If there were two men sitting in the door of the box car on the side toward the Broadway theatre I could not have seen them. If there were two men there they were not members of the train crew, because all of my train crew were in sight. As to the amount of travel over the crossing at 7th and Broadway, I could not say that there is any great amount of difference in the travel over any of those crossings. I will say that we were troubled a great deal with small boys playing on and about those tracks—particularly with small boys jumping on and off the engine. I was particularly careful on the day of the accident, and at that time there was nothing unusual in the amount of traffic over this particular crossing. During the time an engine was pushing a box car, the brakeman on the box car would have to stand far enough back on the car so the engineer could see him. If he had been seated on the front end of the box car I would not have known he was there, and the conductor could not have seen him as well as I. The idea of having a brakeman on the front end of a train is to give the engineer any warning of danger ahead. If the brakeman stood at the extreme front end of the box car and the brakes were applied, unless he was holding onto something, he would go overboard.

Under cross examination, the witness testified as follows:

I cannot say that I received any signal at all from Brakeman Domingo Charres, because when I received

a signal from the conductor I immediately looked to see what the cause of it was, and I saw this little boy running toward the car. It was after I received the signal from the conductor that I applied the air. I am positive that the car did not move more than six or eight feet—about the length of a car truck after the air was applied. I took enough notice to know that I did not move but a short distance after I got the signal from the conductor. The place where the boy was picked up was very close to the place where he was struck. The car had stopped when I saw him attempting to crawl out from under the car. There are a number of children playing around the vicinity of 7th and Broadway at all times of the day. I don't know whether there were more at the particular hour of the accident than at other hours. I do not go down those particular hours. We went at all hours—whenever the yardmaster ordered us to go down there. It might be at any time. There was no flagman at that crossing that I know of. I saw no gates there. I do not think that the maintenance of a flagman or gates at the crossing of 7th and Broadway would tend to make that crossing safer. They would crawl under the gates and they would run around the flagman. Very possibly, the fact that there was a flagman to run around and gates under which to crawl would tend to make people using that crossing more careful, but you have to figure on the class of people you have to deal with. I was an engineer in the States, and worked for the New York Central. The New York Central maintains either a flagman or gates at street crossings.

35 Upon re-direct examination, the witness testified as follows:

Only the front truck of the box car passed over the boy's leg. In the States railroads maintain flagmen or gates in villages or on particularly dangerous crossings that are not in villages, but that is entirely a question of traffic and fast trains. From my experience as a railroad

man, and as a common sense proposition, I should say that no flagman or gates are needed on Broadway, if everyone operated an engine down there as I did. Then there would be no chance of anybody being run over unless they ran right under the cars.

MR. THOMAS J. SHIRLEY, the fifth witness called by the plaintiff, testified as follows:

My name is T. J. Shirley. I am employed by the Panama Railroad Company. I have been employed by the Panama Railroad for the past seven years. During that time I have been a conductor. (At this point counsel for plaintiff admitted Mr. Shirley's qualifications as an expert railroad man). I remember the accident which occurred at 7th and Broadway when this little boy was run over. We were at the north end of Broadway down at De Leon's (the ice plant), and at the "Y", doing some work. After getting my work straightened up I proceeded south from De Leon's to the north end of Broadway, and on arriving at 7th Street I saw the boy running, and he was running at an angle toward the track. I thought that the boy was going to turn and run down the street, but in place of that he turned and got right in front of the car. We had a box car in front of us and a coal car in the rear. As soon as I saw the boy make the turn I gave the engineer a signal, to which he responded very quickly, but at the time I did not know whether the boy had gotten by or not, but I ran to the front end and I was there just about as quick,—in fact almost as quick as we got stopped. (At this point the witness was shown the map). When I noticed the boy he was here (indicating). I figured he was going straight down the road, and instead he switched right in ahead of the car. I picked him up about three feet from the edge of the sidewalk—three feet north of the south sidewalk (Indicating the point marked with a small square). The point at which he was struck and the point at which he was picked up were

a little distance apart. Being hit would knock him a distance away. He was possibly knocked the length of himself. After the brake was applied I do not know exactly what distance the train traveled. It was a very short distance—I should say a truck-length over the boy. The truck just cleared. The car, when stopped, was not entirely clear of the crossing. In going down Broadway we were running between five and six miles an hour. I do not know positively, but I do not think it was more than that. I have been up and down Broadway a great many times. Previous to the accident I have often noticed the hibiscus hedge, but I have never measured it. I should judge it was from 3½ to 4 feet high. At the time of the accident Domingo Charres, brakeman, was on the car we were shoving. I am sure he was on top of the car, because I saw him there. The man on the rear of the train was a lad named Brown. I gave the signal to Mr. Neville just as soon as I saw the boy give the dart. He could not have been on the track at that time. From the position I was in I could not have seen him if he was on the track. (The attorneys for the plaintiff here admitted that traffic was greater at main line crossings than at 7th and Broadway, the scene of the accident). The proper place for the head brakeman on such a train as we were running was on top of the front car. As a common sense proposition, that man need not stand at the extreme front end of the car. If he were at the extreme front end of the car and the brakes were applied he would be thrown off the car. By standing on top of the car a brakeman would be in a better range of view to the engineer, because when a box car is being pushed the box car is as high as the engine, and the engineer could not take the signal as far, and probably could not get it at all if the brakeman were seated. The custom is for the brakeman to stand on the top of the car at about its center. I do not know whether or not that is the place that Domingo Charres was standing. I know that he was up there, and that he was standing when we started, but from my position on the footboard I could not see him.

36 Under cross examination, the witness testified as follows:

Even though Charres was in proper position on top of the box car I could not see him from my position on the footboard of the engine. I saw him climbing to the top of the car, and I saw him after he had gotten up there. At that time he was near the front end of the car. At the time of the injury I do not know just where he was standing. He may have made a few steps forward or backward. I could see him only when we left. The position I was in prevented me from seeing him. I was standing on the footboard of the engine, and that prevented me from seeing him. The Panama Railroad does not maintain a flagman or gates at the crossing of 7th and Broadway.

HARRY NEAL, the sixth witness called for the defendant, testified as follows:

My name is Harry Neal. I have been a fireman in the service of the Panama Railroad for twelve years. I was a member of the train crew at the time this boy was injured. In my position my left hand was on the window and my right hand on the bell. The bell was ringing all the time after leaving the ice plant. The ice plant is near the Colon Hospital. I saw brakeman Charres give a stop signal to the engineer and the engineer applied the brake and the stop was made. Charres was on top of the box car. I didn't know why the stop signal was given. I thought it was a dray or coach or something passing. I looked through the window, but did not see anything, and when I looked I saw Charres coming down off the car. I listened and I heard a bawling on the Engineer's side, and I looked out and saw the crowd of people and I got off the engine. When I got to the spot the first thing I saw was the little fellow sitting down with the leg taken off, and then I returned to the engine. The

engine in coming down Broadway was not going more than about five miles an hour. I am sure that the bell was ringing from the time we left the ice plant, because the engineer insists on your ringing the bell at all times, and he always insisted on having the bell rung on Broadway. The crowd was so large that I didn't locate the place at which the boy was picked up. He was taken out from under the car and I looked at the boy and went back to the engine. I do not know how far the train went after Charres gave the "wash-out" signal. The emergency brake was applied and the stop made and I looked out of the window. The train traveled perhaps four feet after the brake was applied. I paid some attention to the heighth of the hedge. It catches me about here (Indicates chest high.)

Under cross examination the witness testified as follows:

Charres gave a stop signal. I do not know if Mr. Neville saw it. Mr. Neville was on the other side. I was on the left side. As soon as the signal was given the emergency brake was applied. It appears to me that the brakeman's signal and the conductor's signal must have been given at about the same time. I could not see the conductor giving a signal to the engineer.

DOMINGO CHARRES, the seventh witness for the defendant, testified as follows:

My name is Domingo Charres. I have been a brakeman in the service of the Panama Railroad for ten years and three months. I remember the day on which this little boy was injured. I remember going down 7th and Broadway on that day. After we left the ice plant I got on the head box car right where I could see the engineer, and as we were going down past Seventh St. I saw this little boy coming from the southwest of Broadway at

an angle toward the northeast. I was about in the middle of the box car. The car was just about at the north sidewalk. The boy was coming straight for it, and not paying any attention, and I gave a stop signal and came right down. I lost sight of the boy when he came to within about ten feet of the car. I did not know what had become of him. He ran like this (indicating diagonal direction) toward the box car, and when I lost sight of him he was on the northeast sidewalk. I had no reason to believe that he would run onto the track. We were going at the rate of four or five miles an hour.

37 After the brakes were applied the train stopped within about a truck length, or within about eight feet. I then came down off the car. When the boy was picked up he was on the south side of the crossing or the side away from the Washington Hotel. He was six or eight feet away from the edge of the sidewalk. The bell was ringing while we came down Broadway. I paid some attention to the heighth of the hedge—it would catch me about here (indicating chest high).

Under cross examination the witness testified as follows:

I have testified in two prior trials of this case, once about a month and a half ago, and once before that time. To-day I stated that I saw the boy on the south sidewalk, that is, the sidewalk toward Cristobal. That was immediately before he was struck. Before he was struck I saw him on the north side, that is, the one towards the Washington Hotel. He was about three feet from the hibiscus, and in the middle of the sidewalk. At the time the boy was running a little more or less of a jog trot. I lost sight of the boy when he came within about ten feet of the side of the car. The reason I lost sight of him was that I could not see over the edge or side of the car, and because whenever a thing approaches closely you lose sight of it. At the time the head end of the box car was just approaching the north sidewalk, and that is the time

I lost sight of him. He was not struck on the north sidewalk—he was struck on the south sidewalk. I do not know whether or not when he was ten feet away from the car he suddenly made a flying leap and got struck there. At the time he was struck he was out of my sight. On the first trial of this case I stated that he was within a short distance of the car when I lost sight of him.

JOHN SHARPE, the eighth witness called by the defendant, testified as follows: (Read from testimony given on previous trial, by agreement of counsel).

My name is John Sharpe. I reside in the city of Colon, where I now own a cantina. Before going into the business I was a locomotive engineer for the Panama Railroad Company for ten years. I worked all through Cristobal and Colon. On December 4, 1916, I was at 7th and Broadway, Colon, and witnessed the accident which there took place to this little boy. I went to look for a fellow, and was on my bicycle, and at the time I heard the train coming from 7th Street. Before proceeding over the track I stopped. At this time I saw a little boy coming from the Chinaman's shop in my direction—not exactly running—but he had his head this way (indicates). I saw the engine with a gondola to the rear and a box car to the front. The train was moving slowly. I saw the fireman before I saw the engineer and the bell was ringing. The boy came to the middle of the crossing. The front box car hit his shoulder. He stepped in the middle of the track, and his leg was cut off. At this time I turned my head away. I didn't want to see it. At the time the boy was hit by the car he was on the right side of the crossing coming from Broadway to "G". At the time he was struck he was within the rails on the right hand side of the track.

Under cross examination, the witness testified as follows:

The boy at the time he was struck was on the right hand side of the street coming toward me. I could see him coming from the Chinese shop. I did not see the brakeman on the box car, although I can not say that there was no brakeman on the car, because my attention was taken up with the little boy and with seeing the accident. I was an engineer on the Panama Railroad for ten years. The colored engineers on the Panama Railroad do not undergo the examinations the white men do. They run similar engines, but the colored engineers do not run on the main line.

Upon re-direct examination the witness testified as follows:

I was not connected with the railroad at the time of the accident in question. I was standing on the street near to where the two theatres are.

38 DR. PABLO AROSEMENA, the ninth witness called for the defendant, testified as follows:

(Read from testimony given on previous trial, by agreement of counsel).

My name is Pablo Arosemena. I am 81 years of age; a Panamanian by birth; and Doctor of Laws by profession. I have been practicing law for 40 years. I am a graduate of law of the College of Bogota. I have been President of the Republic of Panama, President of the Sovereign State of Panama twice; have been a member of the Assembly of the State of Panama; Member of the House of Representatives in Columbia; have been Member of the Senate, Attorney General, and Minister Plenipotentiary. I am familiar with the laws of Columbia and Panama, and the jurisprudence and decisions of the Courts of Columbia and Panama. I am now employed as attorney for the Panama Railroad in the Republic

of Panama. I have no professional connection with this case; I have come here in no other capacity than as a witness, and have no connection with this case. I am familiar with the Civil Code of Panama, which was in effect on December 4, 1916, when this boy was injured. It is the same Code that was translated into English by Mr. Magoon. I am familiar with the police rules and regulations of the Republic of Panama. I know their provisions relating to the operation of trains in cities. I am familiar with articles 488 and 489 of the Police Code. I am familiar with the interpretation that has been given them by the Courts of Panama, and with the articles of the Police Code relating to personal injuries, and the articles of the police regulations. I heard the witnesses in this case testify, and understand that this boy was hurt by a car when he stepped upon the track.

Judge Feuille:

Both the plaintiff and the defendant in this case have cited Articles 2341, 2343, 2347, and 2349, of the Civil Code of Panama, which read as follows:

"Art. 2341. He who shall have been guilty of an offence of fault, which has caused another damage, is obliged to repair it, without prejudice to the principal penalty which the law imposes for the fault or offense committed.

"Art. 2343. He who has caused the damage and his heirs are obliged to pay the indemnity.

"He who shall have profited through the fraud of another, without having participated therein, is obligated only to the extent of the value of the benefit he may have derived.

"Art. 2347. Every person is liable not only for his own acts for the purpose of the indemnity of damage, but also for the acts of those who may be under his care.

"Thus the father, and in the absence of the latter, the mother, is responsible for the act of the minor children living in the same house.

"Thus the tutor or curator is responsible for the conduct of the ward who lives under his dependency and care.

"Thus, the husband is responsible for the conduct of his wife.

"Thus, the directors of colleges and schools answer for the acts of their pupils while they are under their care, and artisans and contractors, for the acts of their apprentices or employees, in the same case.

"But the liability of such persons shall cease, if with the authority and the care which their respective quality confers upon them and prescribes, they should not have been able to prevent the act.

"Art. 2349. Masters shall be responsible for the damage caused by their servants or domestics, on the occasion of a service rendered by the latter to the former; but they shall not be responsible if it be proved or appear that on such occasion the domestics or servants conducted themselves in an improper manner, which the masters had no means to foresee or prevent by the employment of ordinary care and the competent authority; in such case all responsibility for the damage shall fall upon said domestics or servants."

39 Articles 488 and 489 of the Police Code, the translation of which was agreed upon by counsel for the plaintiff and counsel for the defendant, was read to the witness, as follows:

"Article 488. When a tramway crosses a town as well as when it passes by a gate or viaduct, it shall not travel faster than the speed of a wagon drawn by horses at a moderate trot; in case of an infraction, the conductor or administrator of the enterprise, subsidiarily, shall pay a fine of ten to a hundred pesos, without prejudice to

the responsibility, civil or penal, to which the latter may be subject by reason of the damage, fault or offense.

"Article 489. The tramway, when passing places in which there are or may be a gathering of people, shall call their attention from afar and shall continue calling attention to passersby by means of a whistle, bell, horn, or other adequate instrument. Every infraction of this provision shall be punished by a fine of from five to one hundred pesos; but if the omission should occasion damage or prejudice to a third person, the procedure provided for in the preceding article shall be followed.

"This article and the previous one shall be applied to railroads when they enter cities or towns." (Ordinance No. 87 of 1896).

Judge Feuille:

Now, Doctor Arosemena, you have heard all the facts in this case. You were sitting there when the statement was made by counsel in which it is charged that the engine was mismanaged, that we failed to keep a flagman there and failed to keep a gate. Under the circumstances in this case, Doctor, applying the jurisprudence, i. e., the decisions and rules of the Courts of Panama, would the Panama Railroad Company be liable in this case?

A. I believe I can state that I know the subject matter in this action very well, because I have had occasion to study it frequently. I was the attorney for the Panama Railroad in the Ramirez case. It was for the sum of 60,000 pesos and 1,000 pesos costs—61,000 pesos altogether. Ramirez fell to the ground and his leg was broken. The Court decided the case in favor of the Panama Railroad. The Judge decided that the directors of the railroad couldn't foresee what was going to occur. Smith was the conductor, and it was the first time he was on the train and didn't know Ramirez. And the Articles 2345 and 2347 of the Laws of Columbia were applicable to that Ramirez case.

Mr. Ganson:

Of the Civil Code?

A. Yes. In this case it is necessary to bear in mind a very important point, which is as follows: The first part of the article establishes the responsibility of the chiefs with regard to the responsibility of the subordinates. But the latter part states that that responsibility does not exist if they could not have foreseen the incident. I think I understand the boys case, for whom I have the greatest sympathy. But I think what is here desired is to do justice. I understand that this boy tried to pass over the track at the time the engine was coming along? I wish to say only the truth. I think in this case the law applicable is the ordinance of the Police Code of Panama. I state my reasons therefor: That the matter occurred in the Republic of Panama. The second reason is that the parents of the child lived in the Republic of Panama. The Police Code of Panama is law by authority of the Republic of Panama, Law 37 of 1904, Article 1 reading as follows:

Article 1. That the amendments or alterations as executed by its national nomenclature, and insofar as it does not come in conflict with the legislative decrees issued by the Provisional Government and the Constitution and the Laws of the Republic of Panama, the codes and the Colombian laws which were in force in the extinct Department of Panama on the second day of November, 1903, will continue in force with the exception of the codes referring to elections. There shall also be in force in the Republic the Administrative code of the Sovereign State of Panama, approved October 12, 1870, and the laws which are amended and added thereto, and the ordinances issued by the assemblies of the Department of Panama in addition thereto and amendatory of the former and of those latter laws . . . . . The law of 1887 and the Civil Code of Panama—those are the two that are applicable to this matter.

40

Q. No, to the general law?

A. But the articles of the Police Law, Nos. 488 and 489, are the special laws. I am familiar with the cases decided by the Supreme Court of Justice of Colombia. I know the case of Ruperto Restrepo with the Railroad of Sabana; and also the case of Cevelia Jaramillo de Cancino vs. the Railroad of the North. In these cases the Civil Code and the Law of 1887 were made applicable. Judging that the railroad, under the law of 1887, was liable, then these police codes have amended it and established certain provisions covering railroads where they pass through towns.

Q. You referred to that law of the Constitutional Convention of Panama of 1904—that red book. Who was the President of that Convention?

A. I was.

Q. Is there such a thing in the laws of the Republic of Panama as compensation for physical pain and suffering or mental pain and suffering?

A. There is none whatever, nor can there be any.

Q. Why can't there be?

A. In the Republic of Colombia there never has occurred a case of that nature.

Q. Has there been a case in the Republic of Panama?

A. I know of none.

Q. How long have you been acquainted with the jurisprudence and decisions of the Republic of Colombia and the Republic of Panama?

A. A long time.

Q. How many years?

A. About fifty years.

Q. Has there been a case—a personal injury case—to your knowledge, in which the judgment was rendered against the Panama Railroad in the superior Courts of Panama since the railroad was constructed?

A. I know of none.

Q. When was the Panama Railroad built?

A. In 1855.

Q. Were you at the opening of the railroad in 1855, Doctor?

A. Yes.

Q. And you have never known of a case in which the Courts of Panama have rendered judgment against the Panama Railroad Company?

Mr. Ganson:

For the purpose of record we will admit that no Court in Panama ever dared to give a judgment against the Panama Railroad Company.

(Objected to by Judge Feuille. The Court sustained the objection and instructed the jury not to pay any attention to the remark made by Attorney Ganson).

Cross Examination.

By Mr. Ganson:

Q. Doctor Arosemena, you have been a lawyer for a long time in Panama, and for a number of years you were attorney for the Panama Railroad?

A. For 20 years.

Q. And you are still attorney for the Panama Railroad?

A. I am attorney for the Panama Railroad
41 for the Panama business only.

Q. Now, isn't it true that all the laws of the Republic of Colombia that were in force in Panama at the time that Panama became independent in 1904 are still in force and effect except insofar as they may have been modified by subsequent legislation?

A. Yes.

Q. That is the reason why the old police code is a law—or was in December, 1916; and is that the reason why the Police Code of Colombia as well as the Police Code of the Sovereign State of Panama are still the laws?

A. Yes.

Q. And the law in Panama in December, last year?

A. The Code of Police was an ordinance of the Panama Department.

Q. Now, Don Pablo, you are familiar with the Ramirez case?

A. Yes, I was the attorney.

Q. And you know the Restrepo case?

A. Yes.

Q. And you say that under the laws of Colombia the Panama Railroad is not liable for any act that may cause injury to another, but only the employees are personally liable? Am I right?

A. Well, it depends on the facts.

Q. But you say in this case the railroad cannot be liable to this little boy? Is it true?

A. Yes, I am sorry, but that is true.

Q. Why is that?

A. Because this case comes within the provisions of the Police Code or Ordinances of Panama.

Q. Is that the only reason?

A. It is the only law.

Q. There is no other law?

A. Well, this article of the ordinance has modified the old legislation in the matter. Suppose this had been an accident on the Chiriqui Railroad. The legislation to be applied would be the law of 1887.

Q. In accordance with the laws of Colombia, when a law of a state, a municipal ordinance or an ordinance of a state or department, conflicts with the law of the Republic itself, which governs?

A. I know very well the very intention and can answer this, that it is an ordinance of the law of the Republic of Panama, because enacted by the Republic of Panama.

Q. All the laws that were in force and effect in Colombia are still in force and effect in Panama except where the Legislature has changed them?

A. I cannot say that, because I have not studied the new codes.

Q. Except where they have been changed they are the same?

A. Yes, because you know very well that in these matters it is impossible to invent. What we have here in Panama is what they have in France, in England, in Germany, in the State of Louisiana—everywhere—because you know very well it is the old law (derecho); and I reiterate, we cannot invent in this matter; we must go by the laws as stated above.

Q. Are you familiar with the Code Napoleon?

42 A. Well, in certain matters, but it is impossible for it to modify the local law.

Q. What is Empresario?

A. That is not a question of law at all.

Q. Would you mind telling the Jury what the word means?

A. Empresario is the owner of any enterprise. An empresario has agents of different kinds.

Q. What is the empresario of the Panama Railroad Line?

A. The empresario is the Panama Railroad Company.

Q. So that the Panama Railroad Company is the empresario or owner of the Panama Railroad Line?

A. Yes, that is the Panama Railroad Company.

Q. Now, if there should happen to be a law of Colombia that still is in force in Panama making the empresario of a railroad company liable to a boy like this for an injury, such as has happened in this case, then the Panama Railroad Company would be liable in this case, wouldn't it?

A. That is an argument of yours.

Q. (Question repeated in Spanish).

A. I repeat it, that is an argument of yours.

Q. The penal code of Colombia was in force in Panama, in December, 1916?

A. Yes.

Q. Are you familiar with Articles 3, 87, and 662 of the Penal Code of Colombia in force in Panama last year?

A. It is impossible for me to say how those articles read.

Q. I am merely asking you if they were a part of the law of Panama in December of last year?

A. Yes.

Q. Now, turning to Articles 3, 87 and 662, I will read the translations that I have made for you:

(Plaintiff's Exhibit "A"):

"Art. 3. Culpa is the imputable but not malicious and voluntary violation of the law, as the result of which any penalty may be incurred."

"Art. 87. In every delito from which damages or injuries may result against any person, natural or juridic, there being comprised among these, corporations, organizations and institutions of public right, companies or industrial or mercantile societies, and any other moral entity or ficticious person whatsoever, capable of exercising rights and contracing obligations, and of being represented judicially or extrajudicially, there shall be condemned the authors, accomplices, accessories and harborers, jointly and severally, to reparation for all the damages and to indemnization to all the injuries which may have resulted."

"The condemnation will not be several in the cases excepted in the Civil Code." C. C., Arts. 2344-2341 to 2343.)

"Art. 662. One who voluntarily wounds or injures another from imprudence, carelessness or other cause which can and should be avoided or who in the same manner incurs the culpability although invountary for another being wounded or injured, will suffer an arrest of eight to thirty days and will be summoned."

Q. Do you agree with that?

43 A. Yes.

Mr. Ganson submitted the above articles as Plaintiff's exhibit "A", which was objected to by Judge Feuille. The objections were by the Court overruled, to which defendant noted its exception.

Q. Counsel for the railroad admits the accuracy of the translation. Now, Don Pablo, isn't it true that in accordance with that law that has just been read, not only are employees of the Panama Railroad Company liable, but the empresario itself, the Panama Railroad itself, and all who are connected therewith, jointly and severally—Isn't that what the law says?

A. I am not here to explain the articles of the penal code.

Q. But you have just stated there is no liability on the part of the railroad?

A. The articles written in Spanish are very clear.

Q. Now, with reference to the interpretation that has been given to the various sections of the Penal Code as applicable to civil liability, I desire to ask you whether or not you are familiar with the Commentaries on the Penal Law of Colombia of J. V. Concha, i. e., the treatise on the Penal Law, by Mr. Concha?

A. Yes.

Q. Is he regarded as a respectable authority on Colombian law?

A. Yes.

Q. I will read the translation that I have made:

Commentaries of J. V. Concha on the Penal Law of Colombia, Page 117.

Are ficticious (moral) persons, such as the state, civil and commercial societies, etc., civilly responsible for the acts which their agents or employees may execute? The jurisprudence of certain countries admits it. However, it is necessary to make a distinction between two possible and very different situations.

1. If the ficticious person has been able to freely select his employees or agent, there exists the blame, and there is no doubt whatsoever as to the existence of civil responsibility.

2. If the ficticious person does not enjoy sufficient freedom in this respect; if its employees or agents have received their appointment from a superior authority, there cannot be imputed to it any blame, and consequently the foundation of civil responsibility fails to exist. However, this conclusion is not completely accepted, because it is said that civil responsibility of ficticious persons does not result from the fault but from the law itself when it shall have established it.

Q. Do you agree with that translation?

A. Yes.

Q. Don Pablo, is that the law?

A. I suppose that in this instance it is not applicable. It was an essential element to know the character of the conductor. I am familiar with the opinions of Velez, and in order to establish the responsibility in a case where there is a blame or fault of the subordinate, it is necessary to establish his character or his capacity—in order to establish his former conduct, what he has done before—in order to ascertain exactly what his character is; and if his character is good it eliminates all the responsibilities of his superiors. It is to be taken into consideration in these stock companies. When employments are made they are not made by any one person, but by a number of directors. The responsibility is eliminated by these appointments.

Q. The Panama Railroad has absolutely free action in the selection of its employees, hasn't it?

A. Yes, I suppose it is like other companies, that there may be a good deal of influence used to secure

44 appointments.

An excerpt from the commentaries of J. V. Concha on the Penal Law of Colombia was introduced as exhibit "B" by counsel for the plaintiff, to which counsel for the defendant objected. The objection was overruled by the Court and exception saved by counsel for the defendant.

Q. Are you familiar with Law 62 of 1887?
A. Yes.

Counsel for plaintiff here read plaintiff's exhibit "C" as follows:

Law 62 of 1887:

"The National Legislative Council decrees:

"Art. 1. The occupancy of public roads with railroads is prohibited.

"Notwithstanding such prohibition the government may enter into a contract with the empresario of a railroad by means of which the railroad may use the portion of the public road that may be indispensable, upon the payment of previous indemnifications, along in such places where by reason of the brokenness of the ground it becomes necessary to occupy a part of the public road.

"Art. II. Railroad enterprises are obliged to conveniently establish the service of the public roads which they cross in such a manner that traffic over the highways may not be interrupted or rendered dangerous by such railroad crossings. They must take like precautions in respect to private roads when the crossing is made on a level therewith.

"Art. III. Whenever it becomes necessary to cross a public road, in the construction of a railroad, permission shall be asked of the minister of formento, in order that this official may resolve whether it is proper or not to

grant the permit and that he may order what shall be done for the safety of the transit.

"Art IV. The importation of Chinese for work in the Territory of Colombia is prohibited, without prejudice to any stipulations that have been made with certain companies before the promulgation of this law.

"Art. V. The empresarios of railroads are responsible for the damages and injuries which are caused to persons or properties by reason of the service of the said roads, and which may be imputable to carelessness, negligence or violations of the public rules applicable, which the government shall issue as soon as the present law may be promulgated.

"Given at Bogata, April 16th, 1887."

Q. Is that the law of Colombia, and was it the law of Panama in 1916?

A. Yes.

Q. You say that that law is amended by an ordinance of Panama?

A. The ordinance refers to streets of a city, and the passage of tramway cars or railroads through the streets. This refers to roads and the streets are not roads.

Q. So that under the law of Colombia, if a railroad crosses a road way out in the country where hardly anybody is, and in violation of this law somebody is injured the railroad is liable, but if it crosses a street in the city it does not mean a roadway?

A. That is the law.

Q. You say that you are familiar with the decisions of the Supreme Court of Columbia with reference to these matters?

A. Yes.

Q. I desire to call your attention to one other
45 thing, that part that is marked "Garavito."

A. Yes, "Garavito" I am familiar with.

Q. That is good law?

A. Garavito is a compiler.

Q. I desire to read you a section of a decision of the Supreme Court of Colombia, at Bogata, with reference to the self-same law that I have just finished reading.

(Reads and introduces Exhibit "D", as follows):

Sentence of the Supreme Court at Bogata, May 7th, 1897.

"Article V of Law 62 of 1887, in saying that empresarios of railroads are responsible for damages and injuries which may be caused to persons or to property by reason of the service of the said railroad, does not refer only to damages and injuries which may be caused to passengers and to things which are carried in the cars of the railroad.

"The law does not make such a specification, and therefore there is no reason to make such a distinction; in addition, the Code of Commerce has clear dispositions with reference to damages caused to persons or things which the empresarios of transportation take under their charge for transfer from one point to another. To interpret article V of the law cited in this manner would be to give carte blanche to a train when it did not carry passengers nor freight to commit all kinds of abuse, and it is impossible to suppose that such has been the intention of the Legislature." (Vol. II, Garavito, Jurisprudence of the Superior Courts of Colombia, page 241, No. 3974).

Judge Feuille, objected to the introduction of the above as an exhibit, which objection was overruled by the Court, and exception noted by the defendant.

Q. I will read you the decision of the Supreme Court of Bogata under date of December 17, 1897.

(Reads the decision, which is introduced as Exhibit "E," reading as follows):

Extracts from the Decisions of the Supreme Court of Colombia.

"It is not sufficient to exempt from responsibility the empresario of a railroad for damages caused by reason of the service the consideration that for his part he may have taken much care in the selection of the employees and dependents of the enterprise, nor that he was absent when the damage was caused." (Decision of December 17, 1897, page 359).

"That which the legislature desired with the dispositions of Art. V of Law 62 of 1887, was to establish a special rule by virtue of which the empresarios of railroads (not the engineers and dependents), should be liable for the damages caused to persons or property by reason of the service of the said railroads, a rule which has come to complement that of Art. 2347 of the Civil Code." (Decision of Dec. 17, 1897, page 362.)

"In order that there may exist as against empresarios the responsibility of which Art. 2347 of the Civil Code treats for the acts or offenses of its dependents, it is not necessary that the dependence of the latter be abolute; it is sufficient that the act he executed by reason of the service which they may have been intrusted to the individual who serves an empersario since in all the operations under his charge he occupies the position of a dependent of the empresario," (Decision of December 17, 1897, pages 392-393).

Q. Do you agree with that?

(Objected to by Judge Feuille. Objection overruled).

Q. Now, you say that you were the lawyer for
46 the Panama Railroad Company in the case of Felipe Ramirez vs. The Panama Railroad Company?

A. Yes.

Q. I want to read you a translation of a paragraph, which was made by Judge Feuille himself some years ago, and see whether you agree with me that the Court did make this statement:

"The sum of sixty thousand pesos which Mr. Ramirez claims through his attorney, Mr. Isidoro Burgos, for damages and injuries received, would not compensate, even in a small degree the physical and mental suffering of the injured party. His misfortune is lamentable, for, though it may not be permanent, as may be deduced from the prognosis of the physicians, Dr. Jorge E. Delgado, there are mental sufferings, which though not tangible, yet we can all appreciate, principally when they do not affect us personally."

That is an opinion of the Supreme Court of Colombia?

A. It was an opinion of the Superior Court of Justice of the old state of Panama, and, notwithstanding that the decision was in favor of the Panama Railroad.

Q. Yes, and isn't the reason why the decision was favorable to the Panama Railroad was because of the fact, as the opinion cites, that C. Smith, the conductor, had a fight with Ramirez and threw him off the train in the course of a personal fight, and the Court said that the Railroad Company was not liable? It was on account of the fact that the Company was not responsible for a fight that Smith picked himself. We desire to introduce in evidence a copy of the brief prepared by Judge Feuille. (Introduced as Exhibit "F").

Judge Feuille:

We are willing to admit the entire decision in the Ramirez case.

Mr. Ganson:

In the Ramirez case and also in all three of those cases used in the Fitzpatrick brief.

Dr. Arosemena:

In the Ramirez case there are two very distinct cases.

Re-Direct Examination.

By Judge Feuille:

Q. What law of Panama is applicable to this case—The Noel Pigott case?

A. The ordinance of Panama.

Q. What articles of the police ordinance of Panama are applicable to this case?

A. Articles 488 and 489.

Q. Was that ordinance re-enacted by Panama when it became an independent Republic?

A. There is the law.

Q. What law?

A. Law of 1904.

Q. You refer to the law of the Convention of Panama?

A. Yes.

Q. If the law of Columbia of 1887 conflicts
47 with the ordinance of Panama—the police code of Panama—which prevailed there?

A. The ordinance, because it is a law of the Republic

Law 37, of May 4, 1904, on the adaption of codes and reformatory of a provision of the Civil Code, the National Convention of Panama decrees:

"Article I. That the modifications and alterations required by their adaptation to the National Nomenclature, and insofar as they are not in conflict with the legislative decrees issued by the Provisional Junta or Government, there shall continue in force in the Republic of Panama the codes and laws of the Republic of Columbia that were in force in the extinct department of Panama on the 2nd of November, 1903, except the Election Code. There shall continue in force also in the Republic the administrative code of the extinct sovereignty of Panama, approved October 12, 1870, and the laws supplementary and modifying

the same, and the ordinances enacted by the Assemblies of the Department of Panama, with the additions and modifications of those and of these. . . . . .

"Given in Panama on the second day of May, 1904.

"The President, Nicholas Victoria, J.,

"The Secretary, Juan Brin."

(Found on page 51, of the Official Volume of the laws issued by the National Constitment Convention of the Republic of Panama, in the year 1904.)

Whereafter, the defendant introduced his exhibits F to J, inclusive, which read as follows:

EXHIBIT "F"

Article 2347, Civil Code of Panama.

Every person is responsible, not only for his own actions, for the purpose of indemnifying the injury, but for the acts of those under his charge as well.

So the father, and in the fault of the father, the mother, is responsible for the acts of the minor children who inhabit the same house. So the tutor or curator
48 is responsible for the conduct of the pupil who lives under his dependency and care.

So the conductors of colleges and schools respond for the acts of pupils while these are under their care, and the artisans and empresarios (persons in charge of an enterprise), of the acts of apprentices and dependents (dependientes) in the same case.

But the responsibility of such persons shall cease, if, with the authority and care conferred upon and prescribed for them in their respective capacities they could not have prevented the act.

EXHIBIT "G."

Law 37 of May 4, 1904, of the National Convention of Panama.

Article 1. With the modifications and alterations which are required for their adaptation to the national nomenclature, and insofar as they are not in conflict with the legislative decrees issued by the Provisional Junta of Government, or with the constitutional laws of the Republic of Panama, there shall continue in force in the Republic of Panama the Colombian codes and laws that were in force in the extinguished Department of Panama on the 2nd of November, 1903, except the Electoral Code; but there shall also continue in force in the Republic of Panama the administrative code of the extinguished Sovereign State of Panama, approved October 12, 1870, and the laws supplementary thereto and amendatory thereof, and the ordinances enacted by the Assemblies of the Department of Panama supplementary to and in modification of any of the said laws and ordinances.

EXHIBIT "H."

Articles 1 to 5 of Law 62 of April 24, 1887, Enacted by the Congress of the Republic of Colombia.

Art. 1. The occupancy of public roads with railroads is prohibited.

Notwithstanding such prohibition the Government may enter into a contract with the empresario of a railroad, by means of which the railroad may use the portion of the public road that may be indispensable, upon the payment of previous indemnification, along in such places where by reason of the brokenness of the ground it becomes necessary to occupy a part of the public road.

Art. 2. Railroad enterprises are obliged to conveniently establish the service of the public roads which they

cross in such a manner that the traffic over the highways may not be interrupted or rendered dangerous by such railroad crossing, and they must take like precautions in respect to the private roads when crossing is made on a level.

Art. 2. Whenever it becomes necessary to cross a public road, in the construction of a railroad, permission shall be asked of the Minister of Fomento, in order that this official may reserve whether it is proper or not to grant the permit and that he may order what shall be done for the safety of the transit.

Art. 4. The importation of Chinese for work in the territory of Colombia is prohibited, without prejudice to any stipulations that have been made with certain companies before the promulgation of this law.

Art. 5. The empresarios of railroads are responsible for the wrongs and injuries which are caused to persons or properties by reason of the service of the said roads and which are imputable to want of care, neglect, or violation of the respective police regulations which shall be issued by the Government as soon as this law is promulgated.

EXHIBIT "I"

Article 2349 of the Civil Code of Panama.

The masters respond to the damage caused by their domestics and servants, done in the performance of service from the latter to the former; but they shall not be responsible if it shall be proven or if it appears that on such occasion the domestics or servants have
49 comported themselves in an improper manner, that the masters had no means to foresee or impede the act by the use of ordinary care or competent authority; in this case all of the responsibility for the injury shall fall upon the said domestics and servants.

89

The defendant here rested.

Thereafter, defendant read and filed the following motion for a directed verdict:

"The defendant requests the Court to instruct the jury to render a verdict in favor of the defendant for the four following reasons:

1. Because the defendant company is not liable under the facts and the law of the Republic of Panama applicable to the case.

3. Because the facts do not show that the minor, Noel Pigott, was injured on account of the failure on the part of the defendant to observe any duty that it owed to the said minor.

3. Because the evidence shows that the said minor, Noel Pigott, was injured as the result of his own negligence and want of care.

4. Because the evidence in the case does not authorize the jury to find affirmatively that the said minor, Noel Pigott, was free from fault which contributed to the accident causing his injuries."

Which motion was by the Court overruled, and to which ruling the defendant company saved its exception, then and there in open Court.

Thereupon the defendant read and filed its request for instructions No. 1, as follows:

"If you find from the evidence that Noel Pigott stepped on the track or ran into the box car after the emergency brakes had been applied by Engineer Neville, then I instruct you that the accident was not the result of defendant's negligence, and your verdict must be for the defendant company."

The Court:

"Refused. While that is perfectly good law as to an adult, the Court leaves it to the Jury to say whether or not the boy, Noel Pigott, used that care and caution that would be expected of a boy of his age."

Whereupon the defendant company, then and there in open Court, excepted to the Court's ruling.

Whereafter defendant read and filed its request for instructions No. 2, as follows:

"In the event that your verdict should be for the plaintiff, you are instructed that you are not authorized by the laws of the Republic of Panama to consider the physical and mental pain and suffering of the said minor, Noel Pigott, as an element in assessing damages, and your verdict, should you find one for the plaintiff, must be limited to the material damage suffered by said minor, Noel Pigott."

50 The Court:

"Refused.

Whereupon the defendant company, then and there in open Court, excepted to the Court's ruling.

Whereafter defendant read and filed its request for instructions No. 3, as follows:

"Gentlemen of the Jury, you are instructed that the defendant company was not required by law to keep a flagman at the crossing where said minor, Noel Pigott, was injured; neither was the defendant required by law to maintain any gate or other warning device at that point; and the jury would not be authorized to base a verdict against the defendant solely on the ground of an omission to keep a flagman at the said crossing or to maintain a gate or other signal device there, if in every other respect the defendant had performed its duty."

The Court:

"Refused. Gentlemen of the Jury, while there appears to be no statutory or municipal law requiring them to maintain flagmen or gates there, it is a question for you to decide as to whether or not ordinary care and prudence in operating over the streets of a city would have required them to have maintained a flagman or gate at that place."

Whereupon the defendant company, then and there in open Court, excepted to the Court's ruling.

Whereafter defendant read and filed its request for instructions No. 5, as follows:

"If the jury believe from the evidence that after Noel Pigott's danger was discovered by the train crew, the train crew exercised due care in an endeavor to avoid the accident, then the defendant would not be liable."

The Court:

"So far as it goes it is all right, but that eliminates entirely another item of negligence claimed by the plaintiff, in that they were negligent in not maintaining a flagman or gates at that point. For the reason that it does not embody all of the elements of negligence relied upon by the plaintiff the instruction is refused."

Whereupon the defendant company, then and there in open Court, excepted to the Court's ruling.

51 Whereafter the Court delivered its main charge to the Jury, as follows:

"Gentlemen of the Jury: This is a case wherein the plaintiff, by his guardian ad litem George Morrell, seeks to recover from the Panama Railroad damages in the sum of $50,000, predicated upon personal injuries sustained by the minor on the 4th of December, 1916. The claim of the plaintiff in this case is that these personal injuries

were the result of carelessness, negligence, and want of proper care and prudence on the part of the defendant company. To be more specific, their claim is that this boy was run over by a train of the defendant company in the afternoon of that day, and that he suffered the loss of his left leg in the manner that you have here seen, and that the company was negligent in the following particulars:

"First. That the Company was operating its train at an excessive rate of speed;

"Second. That it failed to give the proper signals as it approached 7th Street, where the injury occurred, that is that it did not ring the bell or blow the whistle;

"Third. That instead of the engine going forward, the engine was in the middle of the train, and that it was pushing before it a high box car, and it is claimed that that was of itself a lack of the degree of care that the defendant should have exercised in going over public streets and crossings of a city;

"Fourth. That they did not have a brakeman stationed on the car that was being pushed forward, or if so, that he was not stationed in the proper place so that he would be able to see people who were about to cross over, in time to give the necessary warning signals;

"Fifth. That there was no flagman at that crossing, nor was there any gate maintained there for the purpose of preventing people from crossing over;

"I may further state that the plaintiff relies upon the fact that hibiscus hedge was growing along the line of the road in that vicinity, and that the bibiscus hedge was so high as to obstruct the view, and which of itself should have entailed upon the defendant company greater care.

"Now, I am simply stating that as the claim of the plaintiff.

"The defendant interposed an answer, in which they set up that the defendant is not liable in this case, under the laws of the Republic of Panama, and also that they were not guilty of any negligence in the operating of their trains, and that if they were, that the boy, Noel Pigott, was guilty of contributory negligence on his part.

"Now, inasmuch as this accident occurred in the Republic of Panama, the Court charges you that the plaintiff cannot recover in this case in this Court unless under the laws of the Republic of Panama a right of action would exist, under the same or similar circumstances as exist in this case. I have left that to you as a matter of fact in this case, and that is a matter of fact that you must decide from the evidence adduced before you, and grom [from] the arguments of counsel. You have heard the testimony of Dr. Pablo Arosemena read to you,
52 to the effect that under the law prevailing in Panama a corporation is not liable for the negligent acts of its servants, provided it used proper care in the selection of competent servants; and if by reason of the neglect or carelessness of such servants, when proper care has been used in their selection, an accident occurs, the servants may be liable, but the corporation is not. That was practically the substance of his testimony. Also his testimony to the effect that where the municipal laws provided a penalty of a fine for carelessness in the operation of the railroad, that fine is all that the railroad company is called upon to respond for, and that they are not called upon to respond in a civil action for the consequences of a negligent act of a servant. That was the testimony of Dr. Arosemena which you have heard. On the contrary you have heard the testimony of Mr. Aizpuru, to the effect that according to the laws of the Republic of Panama there does exist such a right of action against a corporation, that the corporation is liable in Panama the same as in all parts of the United States for the negligent acts of its agents, servants, and employees, and that the fine prescribed by the municipal laws does not preclude the liability of the railroad company in a civil action. You have also heard the laws of the Republic of Panama read to you. Article 2341 provides in substance that the empresarios shall be liable for the negligent acts of its agents and servants. You will consider all of this and then you will arrive at a conclusion of this question as to whether or not, under the laws of the Re-

public of Panama, a corporation is liable for the negligence of its servants, when proper care has been used in the selection of those servants. You have heard it stated that the contrary has been held by the Courts of the Canal Zone, that in actions arising here in the Canal Zone that the railroad company is liable for the negligent acts of its servants just the same as in the States. And while I might give you my individual opinion as to the matter, I, nevertheless, refrain from doing so, leaving the question entirely to you. Now, I charge you if you find that a corporation is not called upon to respond for the negligent acts of its servants in the Republic of Panama, that will determine your labors, and your verdict should be for the defendant. If, however, you find that it must respond, under the laws of Panama, for the negligent acts of its servants and agents, then you will proceed to consider whether or not the defendant was negligent in the operation of its train. As to the rate of speed, it seems to me that the evidence does not justify the contention that it was operating at an excessive rate of speed. As to whether or not it was sounding the bell or giving any warning as it crossed over the crossing, that is a question absolutely for you to determine. You have heard the evidence pro and con, and you will decide as to whether or not any warnings were given. Of course I would charge you that as a matter of law, not only of existing municipal law, but as a matter of general law, that a locomotive should give warning by way of ringing its bell or otherwise, so as to warn those of the proximity of danger.

"As to the question of the handling of cars in the proper manner, as to pushing the box car forward, I also leave that to you as to whether or not that was proper care under the circumstances, and also as to whether or not there was a brakeman on the top of that car, and if so, whether or not he was in the proper place. I leave that as a question for you to determine. You have heard the rules of the Panama Railroad read in evidence, that when a car is being pushed ahead of the engine that there must be or should be a brakeman in some convenient place to as-

certain the approach of danger, and to give the proper warning. Now, there is a conflict of evidence on that point as to whether there was anybody there at that time, and if he was, was he in the proper place. All that I leave to you, whether or not in that respect proper care and prudence was observed.

"Now, coming to the other question: I think it is conceded in this case that there was no flagman or gates at that place to prevent accidents, and in that respect it would seem to me that that would be a duty (if it is a duty) which would rest with the company itself, instead of resting on any particular servant, agent, or employee. In other words, in that respect it hardly seems to me that the corporation could claim immunity on the grounds that that was the fault of some employee of the corporation in not having a watchman there; and in that respect I am of the opinion, if it was a duty at all on the part of the company, it was a duty that pertained to the company itself, instead of any particular officer, agent, or employee. Now then, it is for you to decide, gentlemen, as to whether or not ordinary care and
53 prudence would have required at that time and in that place, that gates or a flagman be maintained, in order to warn a party of the approach of danger. And where a corporation operates its trains through a city and over and across public streets and thoroughfares it is required to use ordinary care and prudence, and it is required to use that care and prudence commensurate with or proportionate to the possibility of injury to the public, and in the event that if fails so to do and injury results as a consequence thereof, the railroad is liable. A railroad operating trains over the streets of a city is engaged in a more or less perilous business in regard to those who may be struck, and therefore, the degree of care and prudence is proportionate or commensurate with the possibility of the injury and the gravity of the injury that may result to the general public in the event of their failure so to do. Now, whether or not, at that time and at that place, ordinary care and prudence would have de-

manded of the railroad company the establishment and maintenance of gates or the keeping of a flagman there, is a question which I leave to you entirely. You are to decide whether or not in your opinion that is the standard of ordinary care and prudence that should be observed by a railroad company, having in view the principle of law that they have no proprietary interests in the city, but are required to use proper care to the general public. If you find in that respect, according to your standard, according to your idea of proper care or prudence, that it was not necessary at that time and place to maintain gates or watchmen, then it would be your duty to find the railroad company not negligent in that respect.

"Now gentlemen, if you find that the railroad company was not negligent in any of those respects mentioned, in the manner of operating its train, in its speed, in the ringing of the bell, and in the failure to maintain flagmen or gates at that point, then that settles your deliberations, and your verdict should be for the defendant. If you find that it has measured up to the standard of proper care and prudence in these respects, then your verdict should be for the defendant. If, however, you find that under the laws of the Republic of Panama a recovery is permitted under such circumstances, and if you find that the railroad was guilty of negligence in any one of the instances specified by the plaintiffs, and that the injury was the result of such failure of care or prudence, if any such you so find, then the next question for you to determine is 'was the boy, Noel Pigott, himself guilty of negligence' because the law is that notwithstanding the negligence of a defendant, it is not liable to respond in damages if the party himself was guilty of negligence which directly contributed thereto, so that the injury was the result of the joint concurring negligence of the two together. Now, if you find that the defendant was guilty of negligence, then you are next to consider 'Was the boy himself guilty of negligence, and did he fail to exercise that degree of care for his own protection that he should have done at the time and place,' that is, ordinary care

and prudence which is required of a person approaching a railroad crossing to exercise his own faculties, his own senses. It is generally expressed in the words 'Stop, Look, and Listen.' To stop, to look, and to listen for the approach of a train. And if by the exercise of those senses he could have seen the approach of the train and avoided the accident, the law does not permit a recovery, although you may find that the defendant was guilty of negligence in the manner of operating its train, or in their failure to maintain gates or flagmen.

"Now, that is the general proposition, but there is another proposition that it is just and fair that I should give you, and that is that the law does not require so high a standard of care and prudence on the part of an infant as it does of an adult. While the standard, as I have heretofore given to you, is that required of an adult, the law is much more lenient or tender in its dealing with an infant. The law expects and knows that children of immature years are liable to act upon childish impulses and instincts, and therefore, the law says that in assuming whether or not an infant has been guilty of contributory negligence or not you are to fix in your mind what would be ordinarily required—what would be expected of a child of the age of the one injured; and if he measures up to the degree of care and prudence that you would ordinarily expect from one of his age and condition, then he is not guilty of contributory negligence, although it might be very negligent on the part of an adult. But if he failed to do, or if he does what ought not to be done by one of his age and injury results, then and in that event he is guilty of contributory negligence, and no recovery can be had, notwithstanding the defendant himself was guilty of negligence. Now, that is the principle of law. You are to consider that this boy was some six or seven years of age. Fix in your mind what a boy of that age should be expected to do, how he should act, and then see if he failed in that respect. Something, in fact much has been said about the fact that he was allowed by his parents to go to school and on errands, and

54

that being allowed to go on errands it must be supposed that he was perfectly capable of taking care of himself. Now, as to whether he was guilty of negligence or not, you must consider the entire evidence. Some say he was going home along the street on the north side along the hibiscus hedge, and in such a way that he could not see the approach of the train, and on the other hand there is much evidence to the effect that he was going along the south side and that as to a train coming from the north the hibiscus hedge did not constitute any obstruction to the boy, and that he went deliberately caticornered across the street into the danger. That is a fact for you to determine, whether he went along on the south side or the north side, and how he did act, and every fact and circumstance connected with it, and then say whether in attempting to cross he measured up to the standard that you as sensible men may fix in your mind for a child of his age.

"In considering the measure of damages they are:

"First. Physical and mental pain and suffering. That, I charge you, is an element of damages. It is hard to fix it exactly in cold dollars and cents, but still it is an item, as the law allows, if you find for the plaintiff at all.

"Second. The next element is the diminution in his earning capacity which you may find he has suffered by reason of those injuries.

"These are the two elements. Any sympathy or pity—that does not enter into it at all. But the two elements are mental and physical pain and suffering and the diminution of his earning capacity that may have been occasioned as a result of his injury, considering the probability of his life, considering what is figured as the average span of life, and what during that average span of life he might have earned, if you find for the plaintiff at all."

And later, on the same day of the trial, the jury returned a written verdict into open Court, as follows:

"We, the jury, on the issues joined herein, find for the plaintiff and assess his damages in the sum of $7,500 United States Currency."

Whereupon counsel for the defendant company gave notice for a new trial, which motion was duly filed on the twenty-seventh day of February, 1918.

Thereafter, on the 28th day of Feby., 1918, at the request of defendant's counsel, the following order was entered, which, omitting caption, reads as follows:

"Ordered, upon request of counsel for defendant, and with consent of counsel for plaintiff, that arguments on defendant company's motion for a new trial, heretofore filed on February 27, 1918, during the current term of this Court, be submitted in the Court House at Ancon on March 27, 1918, at 9:00 A. M., or as soon thereafter as may be convenient, without prejudice to the defendant company's right of appeal on account of the fact that such arguments on said motion for a new trial were not heard by the Court within the current term.

(Signed) WILLIAM H. JACKSON,
District Judge."

Thereafter, on April 13, 1918, arguments of counsel for the respective parties having been heard on said motion for a new trial, the same was overruled on the same day, to which ruling counsel for the defendant company then and there in open court excepted.

55 Whereupon the Court ordered the entry of judgment in the sum of $7,500 in favor of the plaintiff and against the defendant company, together with costs. Counsel for the defendant company objected to said judgment, and their objection being by the Court overruled, exception was noted, and the Court thereupon gave said defendant fourteen days within which to file its bill of exceptions.

Now, therefore, the defendant company, by its counsel, here tenders to the Court the foregoing statement of facts

and bill of exceptions to the Court's rulings in this case, which statement of facts and bill of exceptions contains all the material facts adduced by the parties on the trial of this cause. The defendant respectfully asks that the foregoing statement of facts and bill of exceptions be approved by the Court, and made a part of the record in this cause.

FRANK FEUILLE,
WALTER F. VAN DAME,
Attorneys for the Panama Railroad, Defendant.

Approved and ordered filed and made a part of the record, the parties hereto agreeing.

WM. H. JACKSON,
District Judge.

Attest:

E. M. GOOLSBY,
Clerk of the District Court.

Filed April 23rd, 1918, in the office of the Clerk of the District Court, Canal Zone.

E. M. GOOLSBY, Clerk.

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56 PETITION FOR A WRIT OF ERROR AND SUPERSEDEAS.

United States of America, Canal Zone.

In the District Court of the Canal Zone for the Division of Cristobal.

Noel Pigott, a minor, by his guardian ad litem, George Morrell, Plaintiff,
vs. Civil No. 174.
Panama Railroad Company, a Corporation, Defendant.

Comes now the defendant company by Frank Feuille and Walter F. Van Dame, its attorneys, and feeling itself

aggrieved by the judgment of the Court in the above entitled cause, entered on April 13, 1918, petitions the Honorable Court for an order allowing said defendant company to prosecute a writ of error to the United States Circuit Court of Appeals for the Fifth Circuit, and in view of the fact that the defendant company has already furnished security in the amount of Ten Thousand Dollars ($10,000) United States Currency, which was the sum fixed by the Court on the said thirteenth day of April, 1918, all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Fifth Circuit.

FRANK FEUILLE,
WALTER F. VAN DAME,
Attorneys for the Defendant Company.

Filed August 21, 1918, in the office of the Clerk of the District Court, Canal Zone.

W. B. CHEATHAM,
(Seal) Clerk.

Indorsed:—Filed August 21st, 1918, in the office of the Clerk of the District Court, Canal Zone. W. B. Cheatham, Clerk.

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57 ASSIGNMENT OF ERRORS.

United States of America.

In the United States Circuit Court of Appeals for the Fifth Circuit.

The Panama Railroad Company, Plaintiff in Error,
vs.
Noel Pigott, a minor, by his guardian ad litem, George Morrell, Defendant in Error.

Now comes the Panama Railroad Company, Plaintiff in Error, by its counsel, Frank Feuille and Walter F. Van

Dame, and files the following assignment of errors on which it will rely in the prosecution of the writ of error in the above entitled cause:

I. The Court erred in overruling plaintiff in error's written motion for a continuance, based in part on the unavoidable absence of the plaintiff in error's leading counsel in the case, who was then engaged in the performance of public duties.

II. The Court erred in overruling plaintiff in error's motion for a directed verdict.

III. The Court erred in refusing to give to the jury special instructions No. 1, requested by plaintiff in error, which reads as follows:

"If you find from the evidence that Noel Pigott stepped on the track or ran into the box car after the emergency brakes had been applied by Engineer Neville, then I instruct you that the accident was not the result of defendant's negligence, and your verdict must be for the defendant company."

IV. The Court erred in refusing to give special instruction No. 2, requested by plaintiff in error, which reads as follows:

"In the event that your verdict should be for the plaintiff, you are instructed that you are not authorized by the laws of the Republic of Panama to consider the physical and mental pain and suffering of the said minor, Noel Pigott, as an element in assessing damages, and your verdict, should you find for the plaintiff, must be limited to the material damage suffered by said minor, Noel Pigott."

V. The Court erred in refusing to give special instruction No. 3, requested by plaintiff in error, which reads as follows:

"Gentlemen of the Jury, you are instructed that the defendant company was not required by law to keep a flagman at the crossing where said minor, Noel Pigott, was injured; neither was the defendant required by law to maintain any gate or other warning device at that point; and the jury would not be authorized to base a verdict against the defendant solely on the ground of an omission to keep a flagman at the said crossing or to maintain a gate or other signal device there, if in every other respect the defendant had performed its duty."

58 VI. The Court erred in refusing to give special instruction No. 5, requested by plaintiff in error, which reads as follows:

"If the jury believe from the evidence that after Noel Pigott's danger was discovered by the train crew, the train crew exercised due care in an endeavor to avoid the accident, then the defendant would not be liable."

VII. The Judge's charge to the jury was erroneous in that it did not correctly apply the law of negligence to the facts of the case.

VII. The Judge's charge to the jury was erroneous because it was based on the assumption that the plaintiff in error was guilty of negligence, and that if there was any negligence on the part of the minor, Noel Pigott, it was of a contributory nature only.

IX. The Court erred in instructing the jury upon the measure of damages in the following particulars:

"First. Physical and mental pain and suffering. That, I charge you, is an element of damages. It is hard to fix it exactly in cold dollars and cents, but still it is an item, as the law allows, if you find for the plaintiff at all.

"Second. The next element is the diminution in his earning capacity which you may find he has suffered by reason of those injuries.

"These are the two elements. Any sympathy or pity—that does not enter into it at all. But the two elements are mental and physical pain and suffering and the diminution of his earning capacity considering the probability of his life, considering what is figured as the average span of life, and what during that average span of life he might have earned, if you find for the plaintiff at all."

X. The Court erred in instructing the jury as follows:

"Gentlemen of the Jury, while there appears to be no statutory or municipal law requiring them to maintain flagmen or gates there, it is a question for you to decide as to whether or not ordinary care or prudence in operating over the streets of a city would have required them to have maintained a flagman or gates at that place."

XI. The Court erred in that part of the charge to the jury wherein they instructed that they should determine whether ordinary care or prudence required the plaintiff in error to maintain gates or flagmen at the place where the accident occurred, because there was no evidence to justify the charge, and the charge as given did not contain a correct application of the law.

XII. The Court erred in submitting to the jury the issue of law as to the responsibility of empresarios under the laws of Panama; first, because the jury were not given in the charge all the Panaman law applicable to the case, and, second, because the issue presented was a legal one for the determination of the Court, not an issue of fact for the jury.

XIII. The Court erred in overruling the plaintiff in error's motion for a new trial, and in rendering final judgment against the plaintiff.

59 Wherefore, the plaintiff in error prays that the judgment of the District Court of the Canal

Zone for the Division of Cristobal be reviewed by the United States Circuit Court of Appeals for the Fifth Circuit, that the said judgment be reversed, and a judgment be rendered in this Court in favor of the plaintiff in error.

FRANK FEUILLE,
WALTER F. VAN DAME,
Attorneys for Plaintiff in Error.

Filed this twenty-first day of August, 1918.
W. B. CHEATHAM,
(Seal) Clerk, District Court of the Canal Zone.

Indorsed:—Filed August 21st, 1918, in the office of the Clerk of the District Court, Canal Zone. W. B. Cheatham, Clerk.

ORDER ALLOWING WRIT OF ERROR.

United States of America, Canal Zone.

In the District Court of the Canal Zone for the Division of Cristobal.

Noel Pigott, a minor, by his guardian ad litem, George Morrell, Plaintiff,
vs. Civil No. 174.
Panama Railroad Company, a Corporation, Defendant.

Upon motion of Frank Feuille and Walter F. Van Dame, Counsel for the defendant Company, and upon filing a petition for a Writ of Error and an Assignment of Errors, it is

Ordered that a Writ of Error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Fifth Circuit, the judgment heretofore entered herein on the thirteenth day of April, 1918, and that the amount of the bond on said Writ of Error, as has already been fixed by the Court, be and is the sum of Ten Thousand Dollars ($10,000.00), United States Currency.

And it is further ordered that the Citation in
60 Error issue to the said Noel Pigott, a minor, by his guardian ad litem, George Morrell, plaintiff herein.

WM. H. JACKSON,
District Judge.

W. B. CHEATHAM,
(Seal) Clerk.

Filed August 21, 1918, in the office of the Clerk of the District Court, Canal Zone.

W. B. CHEATHAM,
Clerk.

Indorsed:—Filed August 21st, 1918, in the office of the Clerk of the District Court, Canal Zone.

* * * * * * * * * *

63 DEFENDANT'S EXHIBIT "A."

Omitted from the printed record, pursuant to joint stipulation of counsel for both parties, as follows:

"Panama Railroad Company, a Corporation, Plaintiff in Error,

vs. No. 3291.

Noel Pigott, a minor, by his guardian ad litem, George Morell, Defendant in Error.

Stipulation.

To the United States Circuit Court of Appeals for the Fifth Circuit, Sitting at New Orleans, Louisiana:

Now comes Frank Feuille and Stevens Ganson, of counsel for the plaintiff in error and defendant in error, respectively, in the above-numbered and styled cause, and agree that the large sketch map marked "Defendant's Exhibit 'A'" and forming part of the record herein, may be omitted from the printed record, and considered by the

Court as an original document upon the hearing of the case.

(Signed) FRANK FEUILLE,
Counsel for the Panama Railroad Company, Plaintiff in Error.
STEVENS GANSON,
Counsel for Noel Pigott, a minor, by his guardian ad litem George Morrell, Defendant in Error."

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64 CLERK'S CERTIFICATE.

United States of America,
Canal Zone, ss:

In the District Court of the Canal Zone for the Division of Cristobal.

I, W. B. CHEATHAM, Clerk of the District Court of the Canal Zone, for the Division of Cristobal, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the foregoing pages, numbered 1 to 63, inclusive, contain a true and complete transcript of the record and proceedings had in the said Court in the cause of the Panama Railroad Company, a Corporation, Plaintiff in Error, against Noel Pigott, a minor, by his guardian ad litem George Morrell, Defendant in Error, as the same remain of record and on file in this office, together with the original of defendant's Exhibit "A" marked "Original Exhibit 'A' offered in evidence by defendant herein—William H. Jackson, Judge."

In witness whereof I have caused the seal of the said Court to be hereunto affixed at Cristobal, Canal Zone, in the Division of Cristobal for the District Court of the Canal Zone this 26th day of August, in the year of our Lord one thousand nine hundred and eighteen, and of the Independence of the United States the one hundred and forty-second.

W. B. CHEATHAM,
Clerk.

(Seal)

That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and Submission.

Extract from the Minutes of March 3d, 1919.

No. 3291.

PANAMA RAILROAD COMPANY

versus

NOEL PIGOTT, a Minor, by His Guardian Ad Litem, GEORGE MORRELL.

On this day this cause was called, and, after argument by Frank Feuille, Esq., for plaintiff in error, and Stevens Ganson, Esq., for defendant in error, was submitted to the Court.

Opinion of the Court.

Filed March 27th, 1919.

United States Circuit Court of Appeals, Fifth Circuit.

No. 3291.

PANAMA RAILROAD COMPANY, Plaintiff in Error,

v.

NOEL PIGOTT, a Minor, by His Guardian Ad Litem, GEORGE MORRELL, Defendant in Error.

Error to the District Court of the Canal Zone.

Before Pardee, Walker and Batts, Circuit Judges.

Memorandum Opinion by Pardee, Circuit Judge.

The statement of the case by plaintiff in error is as follows:

"The minor, Noel Pigott, resides with his father, Thomas Pigott, in the city of Colon, Republic of Panama. They are British subjects. George Morrell, guardian ad litem of the minor, Noel Pigott, is an American citizen, but resides in the city of Colon, Republic of Panama.

The complaint in this case was filed for the minor, Noel Pigott, by George Morrell, his guardian ad litem, who acted under the order of the District Court of the Canal Zone. The complaint involves a de-

mand for damages against the plaintiff in error in the sum of $50,000 alleged to have accrued to the said minor on account of an injury received by him in being knocked down and run over by one of the freight cars of the plaintiff in error, in the latter's switch yard situated between E Street and Broadway in the city of Colon in the Republic of Panama, at the 7th Street crossing. The minor lost his left leg as a result of the accident, which occurred on December 4, 1916. The complaint charged the plaintiff in error with negligence in the operation of its train, and the latter filed a general denial, and by way of special answer it alleged that it was not liable under the laws and jurisprudence of the Republic of Panama, and further, that the injury to the minor, Noel Pigott, was the result of his own negligence.

The case was tried before a jury on the 15th of February, 1917, in the Cristobal Division of the District Court of the Canal Zone, and resulted in a verdict and judgment in favor of the defendant in error in the sum of $7,500.

The plaintiff in error now brings this case to this court on writ of error, and is asking that the judgment of the trial court be set aside for the reasons stated in the plaintiff in error's assignments of error."

Then follow some thirteen assignments of error, complaining of the trial court's refusal to grant a continuance; to grant a new trial; and to direct a verdict for the plaintiff in error; also refusing special instructions requested, and complaining of instructions given to the jury on the merits of the case.

We have carefully considered all the assignments of error in the light of the elaborate briefs presented in the case, and conclude that none of the assignments of error present any reversible error.

Motions for continuance and for a new trial, under the Panama law and the general jurisprudence of this court, are questions within the discretion of the trial court and not reviewable upon appeal unless abuse of the discretion is shown, and none appears in this case.

The motion for a directed verdict was properly refused, because the evidence in the case as to the negligence of the plaintiff in error and contributory negligence on the part of the minor, Noel Pigott, was conflicting and not only warranted but required a submission of the case to the jury.

The vital questions involved in this case as to the claimed construction of the laws of Panama have been settled in this and the Supreme Court adversely to the contention of the plaintiff in error: See Panama Railroad Co. v. Bosse, 239 F. 303, recently affirmed in the Supreme Court at the present term; Panama Railroad Co. v. Toppin, 250 F. 989; Railroad Company v. Gladmon, 15 Wall., 401; and Grand Trunk Railway Co. v. Ives, 144 U. S., 408.

As we find none of the assignments of error well taken, the judgment of the District Court is

Affirmed.

(Original Filed March 27th, 1919.)

Judgment.

Extract from the Minutes of March 27th, 1919.

No. 3291.

PANAMA RAILROAD COMPANY

Versus

NOEL PIGOTT, a Minor, by His Guardian Ad Litem, GEORGE MORRELL.

This cause came on to be heard on the transcript of the record from the District Court of the Canal Zone, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause, be, and the same is hereby, affirmed.

It is further ordered and adjudged that the plaintiff in error, Panama Railroad Company, and the surety on the writ of error bond herein, I. L. Maduro, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

Petition for Writ of Error, and Order Allowing Same.

Filed May 28, 1919.

United States Circuit Court of Appeals, Fifth Circuit.

No. 3291.

PANAMA RAILROAD COMPANY, Plaintiff in Error,

vs.

NOEL PIGOTT, a Minor, by His Guardian Ad Litem, GEORGE MORRELL, Defendant in Error.

Petition for Writ of Error from the Supreme Court to the Circuit Court of Appeals for the Fifth Circuit.

The Panama Railroad Company, plaintiff in error in the above numbered and styled cause, by its attorneys, Frank Feuille and Walter F. Van Dame, respectfully represent unto the United States Circuit Court of Appeals for the Fifth Circuit that a judgment was rendered by said Court on March 27th, 1919, in the above styled cause, affirming the judgment of the District Court of the Canal Zone, in favor of the said defendant in error and against the plaintiff in error, in the sum of seven thousand five hundred dollars and

costs; that this is a proper case to be reviewed by the Supreme Court of the United States upon writ of error, in conformity with Section 9 of the Act of Congress, approved August 24, 1912, entitled "An Act to provide for the opening, maintenance, protection and operation of the Panama Canal, and the sanitation and government of the Canal Zone," and commonly known as "The Panama Canal Act"; that the plaintiff in error believes that it is entitled to a reversal of this case, and is desirous that the same be reviewed by the Supreme Court of the United States upon the assignment of errors which accompany this petition for a writ of error.

The premises considered, the plaintiff in error respectfully prays that a writ of error to the Supreme Court of the United States be allowed, and that a supersedeas issue upon the filing of a good and sufficient bond by the plaintiff in error, in conformity with the orders of the Court, and that an order of the Court be made fixing the amount of security which the plaintiff in error shall give upon the said writ of error, and that upon the giving of such security, all further proceedings in this Court shall be superseded and stayed until the determination of said writ of error by the said Supreme Court of the United States.

THE PANAMA RAILROAD COMPANY,
Plaintiff in Error,

(Signed) By FRANK FEUILLE,
WALTER F. VAN DAME,
Its Attorneys.

The writ of error is allowed as prayed for, to operate as a supersedeas, and the plaintiff in error is hereby required to file a good and sufficient bond in the sum of ten thousand Dollars.

26th day of May, 1919.
(Signed) DON A. PARDEE,
Judge.

Assignment of Errors.

Filed May 28th, 1919.

United States Circuit Court of Appeals, Fifth Circuit.

No. 3291.

PANAMA RAILROAD COMPANY, Plaintiff in Error,

vs.

NOEL PIGOTT, a Minor, by His Guardian Ad Litem, GEORGE MORRELL, Defendant in Error.

Assignments of Error on Appeal to the United States Supreme Court.

The Panama Railroad Company, plaintiff in error, has assigned the following errors upon which it will rely in the prosecution of the writ of error in the above entitled cause:

I. The Circuit Court of Appeals erred in affirming the action of the Trial Court in denying the plaintiff in error's motion for a directed verdict.

II. The Circuit Court of Appeals erred in sustaining the action of the trial court in refusing to give the special instruction No. 2 requested by plaintiff in error to the effect that damages for physical and mental pain and suffering were not recoverable under the laws of the Republic of Panama, and in instructing the jury that they might allow such damages.

III. The Circuit Court of Appeals erred in sustaining the action of the trial court in refusing to give special instruction No. 3 requested by plaintiff in error, which instruction reads as follows:

"Gentlemen of the Jury, you are instructed that the defendant company was not required by law to keep a flagman at the crossing where said minor, Noel Pigott, was injured; neither was the defendant required by law to maintain any gate or other warning device at that point; and the jury would not be authorized to base a verdict against the defendant solely on the ground of an omission to keep a flagman at the said crossing or to maintain a gate or other signal device there, if in every other respect the defendant had performed its duty."

IV. The Circuit Court of Appeals erred in sustaining the action of the trial court in respect to that portion of its charge to the jury which bore upon the issue of negligence.

V. The Circuit Court of Appeals erred in sustaining the action of the trial court in respect to that portion of the charge wherein the

jury were instructed that it was for them to determine whether ordinary care or prudence required the plaintiff in error to maintain gates or flagmen at the place where the accident occurred, because the charge was not authorized by the law and the evidence.

VI. The Circuit Court of Appeals erred in sustaining the action of the trial court in respect to that portion of the charge which related to the responsibility of Empresarios under the laws of Panama:

(1) Because the jury were not given in charge all of Panaman laws applicable to the case.

(2) Because the Court should have interpreted the Panaman Laws and their interpretation should not have been submitted to the jury as an issue of fact.

VII. The Circuit Court of Appeals erred in confirming the judgment of the trial court.

Wherefore, the plaintiff in error prays that the judgment of affirmance of the United States Circuit Court of Appeals be reversed, and that the Supreme Court render such judgment as should have been rendered by the trial court.

Respectfully,
(Signed) FRANK FEUILLE,
WALTER P. DAN DAME,
Attorneys for Plaintiff in Error.

Bond on Writ of Error.

Filed May 28th, 1919.

United States Circuit Court of Appeals, Fifth Circuit.

No. 3291.

PANAMA RAILROAD COMPANY, Plaintiff in Error,

vs.

NOEL PIGOTT, a Minor, by His Guardian Ad Litem, GEORGE MORRELL, Defendant in Error.

Bond on Writ of Error.

Know all men by these presents that we, the Panama Railroad Company, a corporation, as principal, and United States Fidelity & Guaranty Company as surety, are held and firmly bound unto Noel Pigott, of Colon, Republic of Panama, in the full and just sum of ten thousand Dollars, to be paid unto the said Noel Pigott, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, successors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 23rd day of May, 1919, in the year of our Lord one thousand nine hundred and nineteen.

Whereas, lately at a term of the United States Circuit Court of Appeals for the Fifth Circuit, in a suit pending in said Court between the Panama Railroad Company, plaintiff in error, and said Noel Pigott, defendant in error, the said Court, through Circuit Judges Pardee, Walker and Batts, affirmed the judgment of the District Court of the Canal Zone, which said judgment was rendered against the said Panama Railroad Company and in favor of the said Noel Pigott in the sum of seven thousand five hundred dollars United States Currency ($7,500.00), together with costs, and the said Panama Railroad Company has applied for a writ of error to review said judgment, having obtained the same, and filed a copy thereof in the Clerk's Office of the said United States Circuit Court of Appeals for the Fifth Circuit to reverse the judgment in the aforesaid suit, and a citation directed to the said Noel Pigott, citing and admonishing him to be and appear at a Supreme Court of the United States of America, at Washington, within thirty days from the date thereof.

Now, therefore, the condition of the above obligation is such, That if said Panama Railroad Company shall prosecute its writ to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE PANAMA RAILROAD COMPANY,
A Corporation,
By FRANK FEUILLE,
Its Attorney-in-Fact.
UNITED STATES FIDELITY & GUARANTY COMPANY,
Surety,
By L. L. BEDOUT,
Its Attorney-in-Fact.

Bond approved and stay of Execution Ordered.
(Signed) DON A. PARDEE,
Judge.

Clerk's Certificate.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 109 to 119 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court,

numbered 3291, wherein Panama Railroad Company is plaintiff in error, and Noel Pigott, a Minor, by his guardian ad litem, George Morrell, is defendant in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 108 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 28th day of May, A. D. 1919.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals before you, or some of you, between the Panama Railroad Company plaintiff in error versus Noel Pigott, a minor, by his guardian ad litem George Morrell, defendant in error, a manifest error hath happened, to the great damage of the said Panama Railroad Company, plaintiff in error, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, to command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 26th day of May, in the year of our Lord one thousand nine hundred and nineteen.

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals.

Allowed by
DON A. PARDEE,
Judge.

I hereby certify that a true copy of the within Writ has this day been lodged in the Clerk's Office for the use of the defendant in error.

Dated this 28 day of May, A. D. 1919.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals.

[Endorsed:] In the United States Circuit Court of Appeals, Fifth Circuit. 3291. Panama Railroad Company, Plaintiff in Error, versus Noel Pigott, through his Guardian ad Litem, George Morrell.

THE UNITED STATES OF AMERICA:

The President of the United States to Noel Pigott, Through His Guardian Ad Litem, George Morrell, Defendant in Error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to writ of error sued out and filed in the Clerk's Office of the United States Circuit Court of Appeals for the Fifth Circuit, in the cause wherein the Panama Railroad Company is plaintiff in error versus Noel Pigott, a minor, by his guardian ad litem, George Morrell, defendant in error, to show cause, if any there be, why the judgment rendered against the said Panama Railroad Company, plaintiff in error, and in said cause mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this 26th day of May, in the year of our Lord one thousand nine hundred and nineteen.

DON A. PARDEE,
United States Judge.

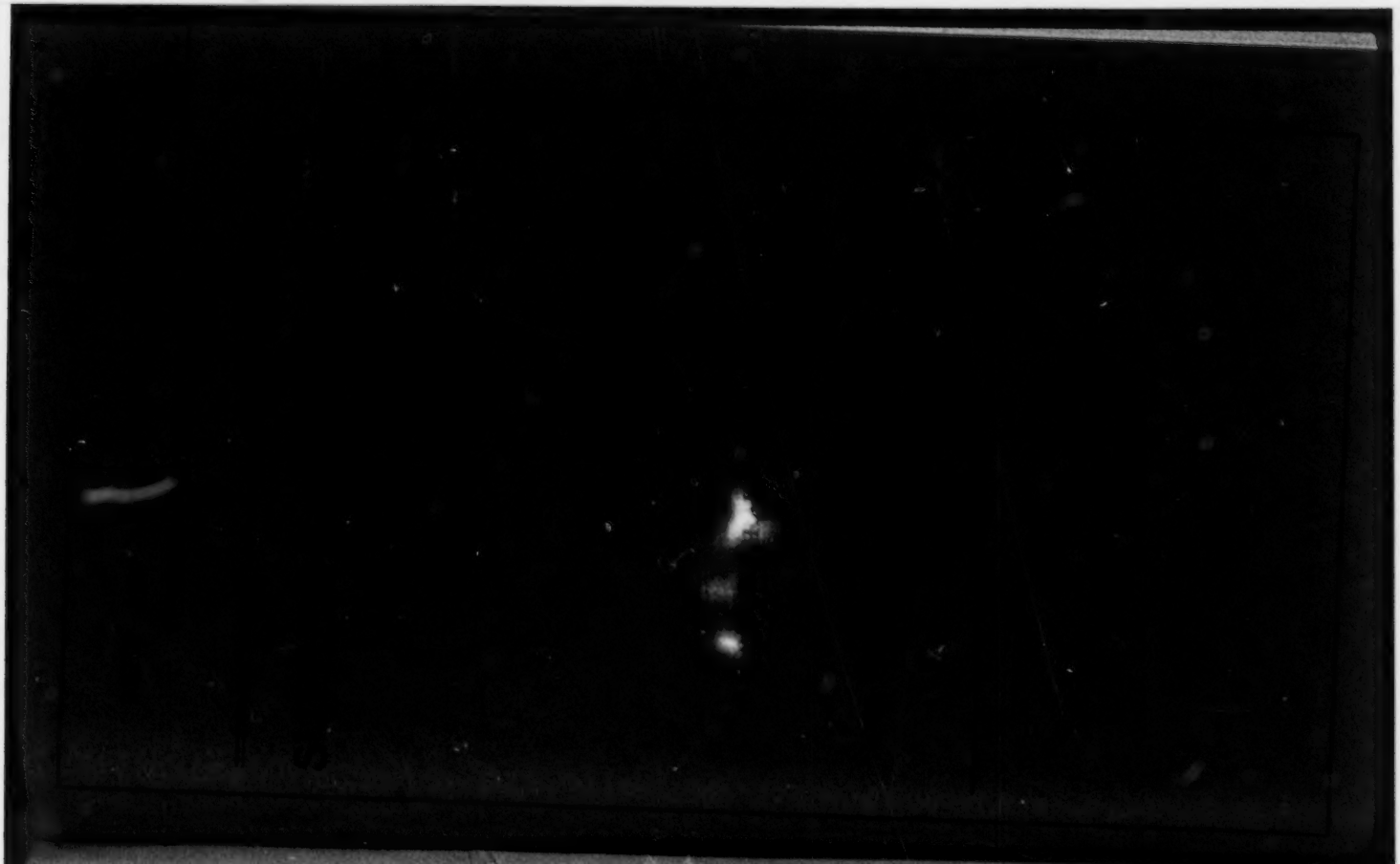
Served at Cristobal, Canal Zone, June 10th, 1919, on Mr. George Morrell, Guardian ad litem for Noel Pigott, a minor, by delivering to him a copy of this Citation.

MIGUEL A. OTERO,
U. S. Marshal for the District of the Canal Zone.

Marshal's fees: Service $1.00.

[Endorsed:] 3291. In the United States Circuit Court of Appeals, Fifth Circuit. Panama Railroad Company, Plaintiff in Error, versus Noel Pigott, through his Guardian, ad litem, George Morrell. Citation. Filed 21st day of June, 1919. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals.

Endorsed on cover: File No. 27,180. U. S. Circuit Court Appeals, 5th Circuit. Term No. 425. Panama Railroad Company, plaintiff in error, vs. Noel Pigott, a minor, by his guardian ad litem, George Morrell. Filed June 25th, 1919. File No. 27,180.



BRIEF AND ARGUMENT ON BEHALF OF
PANAMA RAILROAD COMPANY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920

No. 425

PANAMA RAILROAD COMPANY,
Plaintiff in Error

versus

NOEL PIGOTT, a minor, by his guardian *ad litem*,
GEORGE MORRELL,
Defendant in Error.

CONTENTS.

	Page.
Index of authorities cited	v
Caption	1
Statement of the case	1–2
Assignments of error	2–4
Distinction between Instant Cause and Panama Railroad vs. Toppin (U. S.)	4
Discussion under First Assignment of Error	4–16
Plaintiff in error not liable under facts of the case and the law of the Republic of Panama applicable thereto	5–6
No negligence shown on part of plaintiff in error	6–12
Direct and contributory negligence of the minor, Noel Pigott	12–16
Discussion under Second Assignment of Error	17–20
Expert testimony of Dr. Pablo Arosemena on behalf of plaintiff in error, and testimony of Mr. Elias Aizpuru on behalf of defendant in error, *re* elements of damages under Panaman law	17–18
Elements of damages under laws of Republic of Panama	18–20
Discussion under Third Assignment of Error, together with Fifth Assignment of Error	20–28
Laws of the Republic of Panama impose no duty on plaintiff in error to maintain flagmen at crossings, and failure to do so alone does not constitute negligence	21–28
Discussion under Fourth Assignment of Error	28–29
Direct and contributory negligence of minor, Noel Pigott, and non-negligence of plaintiff in error	28–29
Discussion under Sixth Assignment of Error	29–37
Panaman law applicable to case	30–35
Interpretation by court of foreign law not an issue of fact	35–37
Discussion under Seventh Assignment of Error	37

INDEX OF AUTHORITIES CITED.

	Page.
Atchison, Topeka & Santa Fe Ry. *vs.* Sowers, 213 U. S. 67	6
Bank of China, Japan, and the Straits *vs.* Morse, 168 N. Y. 458; 56 L. R. A., p. 139	36
Beiseigel *vs.* New York Central R. R. Co., 40 N. Y. 9	22, 25
Belton *vs.* Baxter, *et al.*, 54 N. Y. 246	16
Caldwell *vs.* N. J. Steamboat Co., 47 N. Y. 282	25
Cancino *vs.* Railroad of the North, XIII *Judicial Gazette*, Republic of Colombia, Nos. 652–653, decided December 16, 1897	31, 32, 34
Civil Code, Republic of Panama and Canal Zone	21
Civil Code, Republic of Panama and Canal Zone, Art. 2341	30
Civil Code, Republic of Panama and Canal Zone, Art. 2347	30, 31, 34
Civil Code, Republic of Panama and Canal Zone, Art. 2349	30
Code of Civil Procedure of the Canal Zone	35
Commentaries on Civil Code of Spain (Article 1903), Vol. 12, pp. 617 and 618, by Dr. José María Manresa y Navarro	33
Concession Republic of New Granada to Panama Railroad Company, Article 26	10
Conflict of Laws, Wharton, 3d Ed., Vol. II, p. 1505	35
Consequa *vs.* Willings, *et al.*, 6 Fed. Cas. 336	36
Corpus Juris, Vol. 17, section 57, p. 719	18
Cummings *vs.* O'Brien, 122 Cal. 204	37
Eaton *vs.* Erie R. Co., 51 N. Y. 544	25
Ennis *vs.* Smith, 55 U. S. (14 How.), 400; 14 L. Ed. 472	36
Erie Railroad Co. *vs.* Hilt, *et al.*, 247 U. S. 97	16
Grand Trunk Ry. Co. *vs.* Ives, 144 U. S. 408	27
Hartfield *vs.* Roper, 21 Wend. 620	16
Herrick *vs.* Minneapolis & St. Louis R. Co., 31 Minn. 11	19, 20
Kline *vs.* Baker, 99 Mass. 255	36
Law 62 of 1887, Republic of Panama and Canal Zone	21, 30, 34
McKay *vs.* N. Y. C. R. R. Co., 35 N. Y.. 75	26
Miles *vs.* Receivers, 17 Fed. Cas., 285, Case No. 9544	14
Northern Pacific R. Co. *vs.* Babcock, 154 U. S. 190	18, 20
Northern Pacific R. Co. *vs.* Freeman, 174 U. S. 379, 383	14
Note, L. R. A., 1917 F., pp. 10 and 11	12
Panama Railroad Company *vs.* Toppin, U. S. (Opinion rendered March 15, 1920)	4, 31
Police Code of Panama, Articles 488 and 489	10, 30, 34
Slater *vs.* Mexican National R. R. Co., 194 U. S. 120	6, 18
Smith *vs.* Condry, 1 How. 28	6
Union Central Life Insurance Co. *vs.* Pollard, 36 L. R. A. 271	36
Weber *vs.* New York Central R. R. Co., 58 N. Y. 451	25, 26
Wendell, *et al.*, Administrators *vs.* New York Central & Hudson River R. R. Co., 91 N. Y. 420, 424, 426	13, 14, 16

SUPREME COURT OF THE UNITED STATES.

THE PANAMA RAILROAD COMPANY,
Plaintiff in Error,

vs.

NOEL PIGOTT, a minor, by his guardian *ad litem*, GEORGE MORRELL,
Defendant in Error.

No. 425.

Brief and Argument on behalf of the Panama Railroad Company.

STATEMENT OF THE CASE.

The plaintiff, Noel Pigott, a minor, resides with his father, Thomas Pigott, in the city of Colon, Republic of Panama. He and his father are British subjects. George Morrell, guardian *ad litem* of the minor, Noel Pigott, is an American citizen, and resides in the city of Colon, Republic of Panama.

The complaint in this case was filed for the minor, Noel Pigott, by George Morrell, his guardian *ad litem*, who acted under the orders of the District Court of the Canal Zone. The complaint involves a demand for damages against the plaintiff in error in the sum of $50,000, alleged to have accrued to the said minor on account of an injury received by him in being knocked down and run over by one of the freight cars of the plaintiff in error, in the latter's switch yard situated between E Street and Broadway in the city of Colon in the Re-

public of Panama, at the 7th Street crossing. The minor lost his left leg as a result of the accident, which occurred on December 4, 1916. The complaint charged the plaintiff in error with negligence in the operation of its train and failing to maintain a signalman or to employ any means to warn pedestrians of the danger of passing trains in crossing in and upon the said street.

The plaintiff in error filed a general denial to the complaint, and by way of special answer plaintiff in error alleged that it was not liable under the laws and jurisprudence of the Republic of Panama, and further, that the injury to the minor, Noel Pigott, was the result of his own negligence.

The case was tried before a jury on the 15th day of February, 1917, in the Cristobal Division of the District Court of the Canal Zone, and resulted in a verdict and judgment in favor of the defendant in error in the sum of $7,500.

The writ of error was perfected by plaintiff in error to the United States Circuit Court of Appeals at New Orleans. The judgment of the trial court was affirmed by the appellate court on March 27, 1919.

A writ of error was perfected from this Court by the plaintiff in error and service of citation had on defendant in error on June 10, 1919.

The plaintiff in error seeks a reversal of the judgment of the Circuit Court of Appeals upon the following assignments of error:

I. The Circuit Court of Appeals erred in affirming the action of the trial court in denying the plaintiff in error's motion for a directed verdict.

II. The Circuit Court of Appeals erred in sustaining the action of the trial court in refusing to give the special instruction No. 2 requested by plaintiff in error to the effect that damages for physical and mental pain and suffering were not recoverable under the laws of the Republic of

Panama, and in instructing the jury that they might allow such damages.

III. The Circuit Court of Appeals erred in sustaining the action of the trial court in refusing to give special instruction No. 3 requested by plaintiff in error, which instruction reads as follows:

> "Gentlemen of the jury, you are instructed that the defendant company was not required by law to keep a flagman at the crossing where said minor, Noel Pigott, was injured; neither was the defendant required by law to maintain any gate or other warning device at that point; and the jury would not be authorized to base a verdict against the defendant solely on the ground of an omission to keep a flagman at the said crossing or to maintain a gate or other signal device there, if in every other respect the defendant had performed its duty."

IV. The Circuit Court of Appeals erred in sustaining the action of the trial court in respect to that portion of its charge to the jury which bore upon the issue of negligence.

V. The Circuit Court of Appeals erred in sustaining the action of the trial court in respect to that portion of the charge wherein the jury were instructed that it was for them to determine whether ordinary care or prudence required the plaintiff in error to maintain gates or flagman at the place where the accident occurred, because the charge was not authorized by the law and the evidence.

VI. The Circuit Court of Appeals erred in sustaining the action of the trial court in respect to that portion of the charge which related to the responsibility of empresarios under the laws of Panama:

> (1) Because the jury were not given in charge all of Panaman laws applicable to the case.

(2) Because the Court should have interpreted the Panaman laws and their interpretation should not have been submitted to the jury as an issue of fact.

VII. The Circuit Court of Appeals erred in affirming the judgment of the trial court.

Some months after this case was filed here, that is to say, on March 15, 1920, this Court rendered an opinion in the case of the Panama Railroad Company, plaintiff in error, *versus* Joseph T. Toppin. The cause of action in that case arose in the city of Colon, Republic of Panama, and the Court's decision involved the application of Panaman laws. The record in this case, however, in respect to proof of the Panaman laws, is not the same as that of the Toppin case, and there are other issues in the present case which were not involved in the Toppin case.

We will now present our views on the assignments of error here submitted.

FIRST ASSIGNMENT OF ERROR.

I. The Circuit Court of Appeals erred in affirming the action of the trial court in denying the plaintiff in error's motion for a directed verdict.

The motion for a directed verdict was presented to the Court upon the termination of the evidence for the plaintiff and the defendant, and was based upon the following grounds:

1. Because the defendant company is not liable under the facts and the law of the Republic of Panama applicable to the case.

2. Because the facts do not show that the minor, Noel Pigott, was injured on account of the failure on the part of the defendant to observe any duty that it owed to the said minor.

3. Because the evidence shows that the said minor, Noel Pigott, was injured as the result of his own negligence and want of care.

4. Because the evidence in the case does not authorize the jury to find affirmatively that the said minor, Noel Pigott, was free from fault which contributed to the accident causing the injuries.

The action of the Court in overruling the plaintiff in error's motion for a directed verdict was duly excepted to. (P. 19 of the Transcript of Record.)

The first ground of plaintiff in error's motion for a directed verdict was that the defendant company was not liable under the facts and the law of the Republic of Panama applicable to the case. It is fully established by the evidence that the engine and cars in question of the plaintiff in error were under the charge of a competent train crew. Counsel for the defendant in error admitted that the engineer in charge of the engine, Mr. E. J. Neville, was a competent locomotive engineer—that there was none better on the Isthmus. (P. 59 of the Transcript of Record.) And the same counsel also admitted upon the trial that Mr. Thomas J. Shirley, the conductor in charge of the train in question, was an expert railroad man. Hence, it is established by the admissions of the defendant in error that the plaintiff in error had been most careful in the selection of the two principal men in charge of the engine and cars. We, therefore, suggest that in accordance with the law and decisions of the courts of the Republic of Panama, as interpreted and explained by the witnesses in this case, the plaintiff in error was entitled to a directed verdict in its favor. Inasmuch as the fact is uncontroverted that the plaintiff in error had selected the most competent men available to put in charge of the engine and cars in question, it was relieved from responsibility under the laws of Panama as interpreted by the courts of that country. The plaintiff in error's contention is supported by the testimony of Dr. Pablo

Arosemena, one of the most distinguished jurists of the Republic of Panama. (Pp. 69–81 of the Transcript of Record.)

The testimony of Mr. Elias Aizpuru, a witness on behalf of the defendant in error, does not militate against plaintiff in error's contention. (Pp. 44–50 of the Transcript of Record.)

The cause of action arose in the Republic of Panama. The defendant in error, his father, and his guardian *ad litem* all reside in the Republic of Panama. The defendant in error is an alien and a subject of Great Britain, and hence there is no ground upon which a departure from the laws and jurisprudence of Panama would be authorized. As was said in the case of Slater *vs.* Mexican National R. R. Co., 194 U. S., page 120:

> "As the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation (Smith *vs.* Condry, 1 How. 28), but equally determines its extent. It seems to us unjust to allow the plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability the law would impose." (Slater *vs.* Mexican National R. R. Co.; Atchison, Topeka & Santa Fe Ry. *vs.* Sowers, 213 U. S., p. 67.)

The second ground for our motion for a directed verdict was that the facts do not show that the minor, Noel Pigott, was injured on account of the failure on the part of the defendant to observe any duty that it owed to the said minor. The amended complaint filed by the defendant in error charges that the plaintiff in error's railroad line at the place of the accident was a crowded thoroughfare, on which during all hours of the day large numbers of people were passing, and that on the day in question the line of the railroad track was completely

hidden from view by rows of hibiscus planted by defendant company on either side of said track for ornamental purposes; that the said rows of hibiscus were approximately 5 feet 8 inches in height on said date; and that, by reason of the height thereof, children could not be seen by those operating trains on said track until they were directly upon the said tracks. Conceding, for the purpose of this argument, that the hibiscus was approximately 5 feet 8 inches in height, there is no evidence in the record to support the allegation that children could not be seen by those operating the trains until they were directly upon said track, on account of any obstruction to their vision by the hibiscus. The evidence shows that the engineer and conductor did see the minor, Noel Pigott, and that the emergency brake was put on the engine before the boy stepped upon the track in front of the box car. Conductor Shirley testified that he saw him for a considerable distance, and saw the boy when he abruptly changed his course and attempted to dart across the track ahead of the car. The witnesses for the defendant in error who saw the accident were all able to see the engine and cars when they were approaching, and some of them endeavored to attract the boy's attention by yelling. The uncontroverted testimony of Mr. Prather, the engineer, who made the sketch map accompanying this record, shows that the boy could have seen the box car approaching from the middle of the sidewalk located on the north side of the street, and certainly he could have seen the cars for the full length of the street had he been walking along the middle of the street or on the southern sidewalk at the time of the accident. The uncontroverted testimony established the fact that the hibiscus did not obstruct the view of those operating the train. The case is wholly lacking in any evidence tending to prove that the minor, Noel Pigott, could not have seen the approaching car had he

looked. Noel Pigott himself was placed upon the stand to testify in his own behalf, and yet he was not asked the all-important question whether the hibiscus obstructed his line of vision. By putting the boy on the stand, counsel for defendant in error vouched for his legal capacity to testify, yet he failed to ask him any material question respecting the accident, and confined himself solely to having the boy exhibit the stump of his leg to the jury. (P. 50 of the Transcript of Record.)

As a matter of fact, the boy did not stop, look, or listen. Let us see what the witnesses for the defendant in error say on that point. Adina MacCormack testified that the boy was walking along the sidewalk, looking steadfastly before him. She further testified that:

> "When my attention was attracted to the railroad crossing by the shouting I do not know how many people there were at or near the crossing. I went out and saw two men 'hollering' to the boy. They were standing at the crossing near the hibiscus hedge, and acting as though they were waiting 'for the train to pass." (P. 38 of the Transcript of Record.)

The witness, Emily Kidd, testified that she saw the boy from a place on the lower floor of the building in the vicinity of the accident, notwithstanding the hibiscus. (P. 41 of the Transcript of Record.) If this witness could see the boy from a place on the lower floor of the house, it would seem to follow that the men operating the train could have seen him and the boy could have seen the witness.

The testimony of the plaintiff in error's witnesses was to the effect that the boy did not stop, look, or listen, but darted across the tracks in front of the car, and he did this after the emergency brake was applied.

The complaint charges also that the defendant company failed to maintain a signalman or to employ any means to warn pedestrians of the danger of passing

trains which were crossing in and upon the thoroughfare in question. The testimony of the witnesses of the plaintiff in error, who were present at the accident, is to the effect that the engine bell was ringing. They are all explicit in their statement that the bell was ringing. None of the witnesses of the defendant in error testified that the bell was not ringing. Their testimony was of a negative character, that is, that they did not hear the bell ring until after the accident. It is probable that the attention of the witnesses for the defendant in error was fixed entirely upon the boy and his dangerous situation, and that they did not for that reason pay any attention to the ringing of the bell. Nevertheless, their negative testimony can not be accepted in preference to the affirmative statements of the plaintiff in error's witnesses that the bell was ringing.

It is stated that the plaintiff in error did not maintain a flagman at 7th Street crossing; nor did it maintain a gate there. It is submitted that there is no law to require the plaintiff in error to keep a flagman or to maintain a gate at that place. The track at that point is situated in the railroad switch yard, which extends north and south between Broadway on the west and E Street on the east. The switch yard at that point is not often used, and it lies on the outskirts of the city of Colon. The plaintiff in error does maintain gates and flagmen at the crossings in the populous places in the city, although it is not required by law to maintain them.

The rules of the common law, as applied in the United States, do not prevail in the Republic of Panama, and this fact is within the judicial knowledge of the Court. The rights and obligations of the plaintiff in error are measured by positive statute law. There is no law of the Republic of Panama and no municipal ordinance of the city of Colon, so far as the record shows, which require the plaintiff in error to maintain gates or flagmen

at street crossings. Articles 488 and 489 of the Police Code of Panama require the railroad company to call the attention of pedestrians to passing trains by means of a whistle, horn, or other adequate instrument, but there is no Panaman law or decision requiring the company to maintain gates or a flagman at street crossings. There being no common law obligation resting upon railroads under the Colombian and Panamanian law, they can not be required to go beyond the provisions of the Police Code in safeguarding the public from possible accident.

There is no evidence in the record that the authorities of the Republic of Panama, or that the residents of the city of Colon in the vicinity where the accident occurred, had made any complaint against the railroad because it had failed to keep a flagman or maintain a gate at the 7th Street crossing.

We desire to call the Court's attention to the fact that the plaintiff in error's railway is operated under a congressional grant given originally by the Congress of the Republic of New Granada, now Colombia, in 1850. Hence, the concession is an act of the Congress of Colombia, and has the force and effect of law, and is within the judicial knowledge of this Court.

Article 26 of the congressional grant reads as follows:

> "The company is authorized to propose to the executive power such regulations as it may judge proper for the police, security, use and preservation of its ways of communication, ports, works, and establishments of all kinds; but such regulations shall not take effect without the express approval of the executive power, which even after being approved, may annul or amend them, if it think proper, proceeding always in conformity with the laws of the Republic."

It would seem that this provision of the congressional grant would dispose forever of any contention that a common law obligation rested upon the plaintiff in

error to do more than is required by the Police Code of Panama in respect to the manner in which the public should be warned of the approach of trains, and especially within the limits of the railroad company's switch yard.

Again, the complaint charged that while the minor, Noel Pigott, was lawfully upon the street and was crossing the railroad track, the plaintiff in error, negligently and carelessly and with great force and violence, ran a freight car, propelled by a locomotive of the defendant company, in and upon the body of the said Noel Pigott, crushing his left leg above the knee, etc. The conductor and engineer in charge of the train were both first-class railroad men—"None better," as admitted by defendant in error's counsel. It is established even by the testimony of defendant in error's witnesses that the engine and cars were traveling at a slow rate of speed, so that the engineer was able to stop the engine within 5 or 6 feet after putting on his emergency brake. The allegation that the freight car and engine were run with great force and violence against defendant in error is disproved by the testimony of all eye witnesses. The conductor saw the boy from the time he left the Chinese shop until he stepped in front of the moving box car, and when he saw him change his course and dart to the front of the box car he immediately gave a signal to the engineer, and the latter applied the emergency brake at once; and it was after the emergency brake had been applied that the boy stepped in front of the car. There is nothing in the record to refute the clear and convincing testimony of the engineer and the conductor upon that point.

The complaint also charges that the servants and agents of the plaintiff in error failed to give any warning of the approach of the freight car and engine, and that no bell was rung and no whistle was blown by the serv-

ants of the plaintiff in error who were operating the train, although the place where the freight car struck and ran over the boy was a public thoroughfare, and that at the time a number of people were passing thereon. The witnesses for the plaintiff in error who were present at the time of the accident, including the witness Burgoon and the witness Sharpe, all testify affirmatively that the bell was ringing. On the other hand, the witnesses for the defendant in error merely stated that they did not hear the bell or whistle until after the accident. We submit that this allegation was not proven.

The third and fourth grounds upon which the motion for a directed verdict was based are as follows:

> 3. Because the evidence shows that the said minor, Noel Pigott, was injured as the result of his own negligence and want of care.
>
> 4. Because the evidence in the case does not authorize the jury to find affirmatively that the said minor, Noel Pigott, was free from fault which contributed to the accident causing the injuries.

Before discussing the question of contributory negligence on the part of the boy, Noel Pigott, we desire to call the Court's attention to the fact that the evidence fails to show negligence on the part of the plaintiff in error, but it does show negligence on the part of the defendant in error.

> "In many cases recovery has been denied, notwithstanding the injured person, in view of his age and lack of discretion, was not chargeable with contributory negligence, because the injury resulted from an unavoidable accident, and actionable negligence was not shown on the part of the defendant." (L. R. A. 1917 F., pp. 10 and 11.)

This phase of the case will be discussed later on in this brief. We are aware of the distinction that is made by

the courts between the conduct of minors and adults in passing upon their negligence or want of care, and that in determining whether a minor is negligent or not his age and intelligence and other pertinent facts and circumstances will be considered. As was said by the Court of Appeals of New York in the case of Wendell *et al.*, administrators, *vs.* New York Central and Hudson River R. R. Co., 91 New York Reports, page 420, opinion, page 424:

> "Although from an infant, if *sui juris*, a less degree of care is required than from a person of mature age, yet he is chargeable with some degree of care and prudence in approaching a known danger, and is responsible for the consequences of some degree of negligence; and in an action for injuries to him occasioned by negligence of another, absence of this degree of negligence on his part must be made to appear to authorize a recovery."

The defendant in error was a boy of 7 years of age, who lived in the immediate vicinity of the switch yard in question, and attended a school near his house but on the opposite side of the railroad track, and in consequence had occasion to cross the track daily. His parents trusted him to run on errands, and he was sent on an errand to the Chinese shop and was returning from there at the time he was injured. Counsel for the defendant in error called the boy to the stand as a witness, and in so doing vouched for his intelligence and discretion.

> "The assumption that the boy was *sui juris* implies that he had sufficient mental and physical capacity to be chargeable with the exercise of some degree of care and prudence and responsible for the consequences of some degree of negligence, but doubtless, owing to his tender years, a lesser degree of care was required of him than of one of mature age. (Wendell *et al*, Administrators, *vs.*

N. Y. C. & H. R. R. Co., *supra*, p. 426. *see also* Miles *vs.* Receivers, case No. 9544, Federal, Vol. 17.)

The testimony in the case, adduced on behalf of the defendant in error, as well as that on behalf of the plaintiff in error, shows that Noel Pigzott could easily have seen the approaching engine and cars when he came out from the Chinaman's shop onto the sidewalk, and the testimony of the witness, Prather, which was not controverted, shows that the engine and cars could have been seen over the hibiscus hedge by one standing in the middle of the north sidewalk with his eyes at an altitude of 3 feet from the sidewalk. As a matter of fact, the car could have been seen for several blocks from 7th Street, there being no obstruction of any kind. When Noel Pigott left the Chinese store he looked straight ahead and did not stop to look and listen. Had he done so he could have seen the engine and car, certainly from the Chinaman's store; the sidewalk in front of the store, or at any time while crossing from the Chinaman's corner on the south side of the street diagonally across to the sidewalk on the other side of Broadway and on the north side of 7th Street. At no time did the boy endeavor to ascertain whether the engine or cars with the engine were on the track, or if he did he acted regardless of consequences.

> "When it appears that if proper precautions were taken they could not have failed to prove effectual, the court has no right to assume, especially in face of all the oral testimony, that such precautions were taken." (Northern Pacific Ry. Co. *vs.* Freeman, 174 U. S., p. 379, especially opinion, p. 383.)

When Noel Pigott was about to reach the railroad track the witness, John Lewis, yelled "Whoa," presumably at the boy. (P. 43 of the Transcript of Record.) The witness, Emily Kidd, said her attention

was attracted to the crossing by a great noise of people "bawling." She threw down the food she was cooking and then ran and saw the car "bounce" the boy down. (P. 42 of the Transcript of Record.) The witness, Adina MacCormack, testified that she was in the Chinese shop at the time of the accident, and her attention was attracted to the crossing on account of the noise she heard—the noise was like someone calling to people. She then went to the door and saw the boy put his foot on the railroad track. She saw 2 men "hollering" to the boy. They were standing at the crossing near the hibiscus hedge, and acting as though they were waiting for the train to pass. (P. 38 of the Transcript of Record.) It thus appears that the boy did not stop to look or listen, paid no attention to the people who were calling out to him in warning, and did not observe the men who were standing at the hibiscus at the edge of the road waiting for the train to pass. The evidence can lead to but one conclusion, that is, that the boy attempted to run across the track ahead of the box car, exactly in the manner testified to by conductor Shirley. He testified as follows:

> "After getting my work straightened up I proceeded south from De Leon's to the north end of Broadway, and on arriving at 7th Street, I saw the boy running, and he was running at an angle toward the track. I thought that the boy was going to turn and run down the street, but in place of that he turned and got right in front of the car. We had a box car in front of us and a coal car in the rear. As soon as I saw the boy make the turn I gave the engineer a signal, to which he responded very quickly, but at the time I did not know whether the boy had gotten by or not, but I ran to the front end and I was there just about as quick—in fact, almost as quick as we got stopped." (P. 63 of the Transcript of Record.)

The impulse to get across the track ahead of the box car was not unnatural for a boy of Noel Piggott's age, but the plaintiff in error can not be charged with negligence because the boy obeyed a boyish impulse in reckless disregard of consequences.

Noel Piggott should not be permitted to make close calculations to determine whether he could safely pass in front of the approaching car, and when the experiment had failed, charge the consequences of his mistake upon the plaintiff in error. (Belton *vs.* Baxter, *et al*, 54 New York, 246.)

When the plaintiff complains of wrongs to himself, the defendant has a right to insist that he should not have been the heedless instrument of his own injury. (Hartfield *vs.* Roper, 21 Wend. 620.) This was a case where the infant was between 2 and 3 years of age.

> "Whenever it affirmatively appears either that the injury was occasioned by the fault of the party injured, or where there is an entire absence of evidence showing that he is free from fault, he can not recover." (Wendell *et al*, *vs.* New York Central & H. R. R. R. Co., *supra*, p. 426.)

It was held by this court in a recent decision that a statute of New Jersey which provides that any person injured by an engine or car while walking, standing, or playing on any railroad shall be deemed to have contributed to the injuries sustained and shall not recover from the company, applies to a boy less than 7 years old. (Erie Railroad Co., *vs.* Hilt, an infant, by his next friend, *et al.*, 247 U. S. p. 97.)

The fact that there was no flagman and no gate at the 7th Street crossing did not relieve Noel Pigott from taking the ordinary care expected from a boy of ordinary intelligence in order to avoid injury to himself.

We respectfully submit that it was error for the Court to refuse to direct the jury to bring in a verdict for the plaintiff in error as requested by the latter.

SECOND ASSIGNMENT OF ERROR.

"The Circuit Court of Appeals erred in sustaining the action of the trial court in refusing to give special instruction No. 2, requested by plaintiff in error, to the effect that damages for physical and mental pain and suffering were not recoverable under the laws of the Republic of Panama, and in instructing the jury that they might allow such damages."

We respectfully submit that this instruction was in contravention of the laws of the Republic of Panama as interpreted and explained by the witness Elias Aizpuru, who testified on behalf of the defendant in error, as well as by Dr. Pablo Arosemena, who testified on behalf of the plaintiff in error. Upon cross-examination Mr. Aizpuru testified as follows upon the question of damages for physical pain and suffering:

> "Q. Can you tell the Court and the jury of a single decision of the Superior Court of Panama allowing damages for physical pain and suffering—can you name one?
>
> A. No, sir.
>
> Q. In Colombia?
>
> A. No, sir.
>
> Q. Then you are simply stating your opinion?
>
> A. Not against the Panama Railroad.
>
> Q. Any other case—can you mention a single decision?
>
> A. I don't remember just now any against a corporation." (P. 49 of the Transcript of Record.)

Dr. Pablo Arosemena, a witness for the plaintiff in error, testified as follows on the subject of allowing damages for physical pain and suffering under the laws of the Republic of Panama:

> "Q. Is there such a thing in the laws of the Republic of Panama as compensation for physical pain and suffering or mental pain and suffering?

A. There is none whatever, nor can there be any.

Q. Why can't there be?

A. In the Republic of Colombia there never has occurred a case of that nature.

Q. Has there been a case in the Republic of Panama?

A. I know of none.

Q. How long have you been acquainted with the jurisprudence and decisions of the Republic of Colombia and the Republic of Panama?

A. A long time.

Q. How many years?

A. About 50 years." (P. 74 of the Transcript of Record.)

The damages in a case of tort relate to the right of action and not the remedy; and hence, it devolves upon the defendant in error to establish by competent evidence that damages for physical pain and suffering were authorized under the substantive law of Panama as part of the right of action in the case. Our general denial put the defendant in error upon proof of that fact.

> "The measure and elements of damages are, according to the general rule, regarded as controlled, in actions of tort, by the law of the place in which the act occasioning the injury is committed." (*Corpus Juris*, Vol. 17, section 57, p. 719.)
>
> "It seems to us unjust to allow the plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability the law would impose." (Slater *vs.* Mexican National R. R. Co., 194 U. S., p. 120.)

We would also respectfully refer the Court to the case of Northern Pacific R. Co., *vs.* Babcock, 154 U. S. 190. That was an action instituted by the representatives of a railroad employee against the company to recover

damages for the death of the employee caused by an accident while in its employ. The action being tried in a different State from that in which the contract of employment was made and in which the accident took place. This Court held that the right to recover, and the limit of the amount of the judgment are governed by the *lex loci*, and not by the *lex fori*. The suit was instituted in the District Court of the Fourth Judicial District of Minnesota to recover $25,000 damages. The accident upon which the suit was based occurred in the territory of Montana. The representatives of the person whose death was caused by wrongful act or neglect of another, under the law of the territory of Montana, could maintain an action for the wrongful death and recover such damages as under all the circumstances of the case may be just. At the time the accident occurred in Montana, there was a statute of the State of Minnesota which limited the recovery of damages in such cases to $5,000. But at the time of the trial of the case in the court below this limit had been increased to $10,000, by amendment of the Minnesota statute. This Court, in discussing the issue so presented, said:

> "The question of this assignment of error is: Was the amount of damages to be controlled by the law of the place of employment and where the accident occurred, or by the law of the forum in which the suit was pending?"

Upon that proposition this Court held that the law of the territory of Montana governed, and not the law of the State of Minnesota where the suit was instituted. This Court quoted with approval the decision of the Supreme Court of Minnesota in the case of Herrick *vs.* Minneapolis & Saint Louis Railway Co., reported in 31 Minnesota, page 11, as follows:

> "The statute of another State has, of course, no extraterritorial force, but rights acquired

> under it will always, in comity, be enforced, if not against the public policy of the laws of the former. In such cases the law of the place where the right was acquired, or the liability was incurred, will govern as to the right of action; while all that pertains merely to the remedy will be controlled by the law of the State where the action is brought. *And we think the principle is the same, whether the right of action be ex contractu or ex delicto.* (The italics are ours.) 154 U. S. 197.

In the Northern Pacific case just referred to the employee who lost his life was employed under contract, but the action was not based upon a breach of contract, but was *ex delicto*, and predicated upon the negligence of the defendant company in furnishing the deceased with an engine with a defective pilot plow.

THIRD ASSIGNMENT OF ERROR.

The Circuit Court of Appeals erred in sustaining the action of the trial court in refusing to give special instruction No. 3, requested by plaintiff in error, which instruction reads as follows:

> "Gentlemen of the jury, you are instructed that the defendant company was not required by law to keep a flagman at the crossing where said minor, Noel Pigott, was injured; neither was the defendant required by law to maintain any gate or other warning device at that point; and the jury would not be authorized to base a verdict against the defendant solely on the ground of an omission to keep a flagman at the said crossing or to maintain a gate or other signal device there, if in every other respect the defendant had performed its duty."

Assignment of error No. 3 may be considered in connection with assignment of error No. 5, which reads as follows:

"The Circuit Court of Appeals erred in sustaining the action of the trial court in respect to that portion of the charge wherein the jury were instructed that it was for them to determine whether ordinary care or prudence required the plaintiff in error to maintain gates or flagmen at the place where the accident occurred, because the charge was not authorized by the law and the evidence."

The refusal of the Court to grant the instructions which forms the basis of Assignment of Error No. 3, and the action of the Court in giving the instruction to the jury which forms the basis of Assignment of Error No. 5, were duly excepted to by the plaintiff in error at the time of the rulings in open court. (Pp. 91–92 of the Transcript of Record.)

The legal principles applicable to this Assignment of Error have been discussed to some extent in this brief under the First Assignment of Error. (Pp. 4 to 16 of this Brief.)

We have seen that there is nothing in the laws of Panama to require the plaintiff in error to maintain gates or a flagman at the 7th Street crossing, the scene of the accident. Neither the provisions of the Civil Code nor those of Law 62 of 1887, upon which the defendant in error relied in the court below, nor the provisions of the Police Code of Panama, require the plaintiff in error to maintain a flagman or a gate at the 7th Street crossing.

The injury done to the plaintiff in error by the Court's refusal to give the special instruction requested was aggravated by that portion of the main charge wherein the jury were told that it was for them to determine whether ordinary care and prudence would, at that time and place, have required the plaintiff in error to maintain gates or a flagman in order to warn a party of the approach of danger. The jury were, in effect, told by

the Court that although the law did not require the maintenance of a flagman or gate at the crossing of 7th Street and Broadway, that obligation might be imposed upon the plaintiff in error, if, according to the jury's idea of proper care and prudence, it was necessary at that time and place to maintain a gate or flagman.

The action of the Court was not authorized by Panaman law, and we submit that it was not authorized by the laws and jurisprudence of the States of the United States where the common law prevails, so far as we have been able to ascertain from the authorities at hand.

We respectfully refer the Court to the following authorities which would seem to sustain our contention that under the common law the plaintiff in error would not be bound to maintain a gate or flagman at the crossing where the defendant in error was injured.

In the case of Beisiegel *vs.* New York Central, reported in 40 New York, page 9, the jury was instructed by the Court that the defendant was bound to keep a flagman at a street crossing in a populous portion of a city and that it was a question for the jury to decide whether the street crossing in question was such a populous portion of the city that it was due to the public safety, and in common prudence, in view of the high powers exercised by the company, passing with the high speed at which they run their trains, that they should keep a flagman at that point. That, if they thought it was an omission of a precaution which, in ordinary prudence and care, the company was called upon to practice, then it was negligence to omit that duty. To this portion of the charge the defendant excepted, and counsel for the defendant requested the Court to charge the jury that the defendant was not bound to keep a flagman at that crossing. The court refused, and the defendant excepted. In discussing the exception the Court of Appeals said:

> "It thus appears, that the jury were instructed that they were at liberty to find the defendant

guilty of negligence solely on the ground of an omission to keep a flagman at the crossing, if they were of opinion that ordinary prudence required one there, although finding in every other respect that the defendant had performed its duty; as all the other grounds upon which negligence was imputed were controverted questions of fact. The question is thus fairly presented, whether a railroad company is required by law to station a flagman at every street or road crossing where, in the opinion of a jury, the travel is such that ordinary prudence requires it, for the purpose of warning and keeping travelers off from such crossings when trains are passing over them.

"This is an original question in this court, and must be determined upon principle and the analogies of the law. It has been remarked in the opinions, in some cases, that railroad companies are bound to use all possible care to prevent injury to travelers at crossings. If this be so, it is manifest that such injuries may be entirely prevented; as means might be adopted, such as would entirely prevent any person being upon the crossing, or within the reach of the trains when passing. These remarks were not essential to the cases adjudicated. No case has been determined by the court on any such principle. Railroads are authorized by statute to construct their road, and run their trains across streets and highways. The same statute provides that they shall give certain signals for the purpose of warning travelers of their approach and presence; such signals being, in the judgment of the legislature, sufficient to protect the public from injury in the use of the crossings. Keeping a flagman at the crossings, or any of them, is not required by statute; nor does the statute require the company to give warning to travelers otherwise than as therein provided. The question is, whether the common law requires the company to warn travelers of approaching trains by other and more effective means than those the statute requires. The

claim that it does is based upon the maxim, that everyone must so use his own as not to injure another. In applying the maxim to the present case, it must be borne in mind, that the traveler and railroad have each an equal right-of-way in the crossings, derived from the same authority. The former for the purpose of travel, and the latter for running its trains. A collision is somewhat dangerous to the trains, but vastly more so to the travelers. The law imposes upon both the duty of observing care to avoid them. *But the care imposed upon the company is in operating its trains;* in so transacting *its business* in the exercise of its *right-of-way*, as not to *injure others in the exercise of their similar right, provided the latter exercise due care on their part.* This relates to the *mode of operating the trains*, and all other things done by the company in the *transaction of its business.* It does not require the company to employ men to keep travelers off the track, or to serve notices upon them that trains are approaching. Should the company do this, it would relieve the traveler from all necessity of exercising care in this respect; and it would, indeed, be safe for him to go upon the track, having received no express warning. If the exertions of the flagmen were, in any particular case, inadequate to prevent injury to a traveler, upon the same principle, it might be submitted to a jury whether ordinary prudence did not require gates to be closed at certain crossings, while trains were passing, or something else done to protect the traveler; and if, in their judgment, it did, to instruct them that such omission was negligence. If the charge in the present case is sustained, I can see no limit to what is required of the company to exonerate it, upon the ground that it has been free from negligence, except it has done everything, *outside of the transaction of its business, that, in the opinion of a jury, prudence required.* Such is not the true application of the maxim. As above remarked, it requires such

> care *in conducting the business of the company* as will prevent injury to others in the exercise of their rights, if proper care is observed by them; but it requires nothing to be done by the company *outside of such business*, to give warning to travelers outside of the track. *The obligation upon the company to do the latter is imposed by statute; and all that can be required of the company in this respect is a strict observance of the statute.* It is true that the company may employ men to keep travelers off from the crossings when trains are passing; and if they do this, it will be safe for them to run at greater speed, or in other respects different from what would be otherwise permissible, but this is a matter to be determined by the company, and can not be imposed as a legal duty, except by the legislature." (Pp. 12, 13, and 14, of opinion. The italics are ours.)

The ruling announced in the case of Beisiegel *vs.* New York Central was reaffirmed in the case of Weber *vs.* New York Central & Hudson River Railroad Company, 58 New York, page 451. In this latter case the distinction was again made between the duty which the railroad company owed in the operation of its trains or in the use of its right-of-way and that which it owed to the public outside and beyond the operation of its trains and the use of its right-of-way. In discussing this principle the Court said:

> "It is not enough, in all cases, to absolve a railroad corporation from the charge of negligence, that the statutory signals are given. The circumstances may be such as to require other precautions in the running of a train, or in the use and occupation of the tracks. There may be negligence which will charge the company other than the bare omission to sound the whistle or ring the bell. (Beisiegel case, *supra*; Eaton *vs.* Erie R. Co., 51 N. Y., 544; Caldwell *vs.* N. J. Stbt. Co., 47 id., 282; MacKay *vs.* N. Y. C. R. R.

Co., 35 N. Y. 75.) But as a general rule—and if there are exceptions to it they can exist only under very peculiar and in extreme cases, and none occur to me now—a railroad corporation is only called upon, in adopting precautionary measures to prevent collision with and injury to those who in common with it have occasion to use public highways, to have respect to the moving of its trains and the use of its road. A railroad company must so operate its trains and use and occupy its railway, in the enjoyment of the right-of-way which it has in common with the ordinary traveler, as not to injure others in the exercise of their right-of-way, provided the latter are guilty of no want of care on their part. But the rule which imposes the obligation of care and prudence upon a railroad corporation, and measures its liability to others liable to receive injury from moving cars or locomotives, *does not call for any act outside of or disconnected with its actual operations, and the use of the railway. The duty of posting flagmen, or having servants and agents, or placing gates or other obstructions, or of giving special or personal notice to travelers at railway crossings, can only be imposed by the legislature.* Courts and juries can not, whatever may be thought by them of the convenience or necessity of such or other like precautions, at particular crossings, hold the company to provide them under the penalty of being charged with negligence for the omission. Juries may, and must say, whether a railroad company sought to be charged for alleged negligence, has, in the operation of its trains, the use of its road, tracks, and the conduct of its business, used that degree of care and prudence which the circumstances and its obligation to others required, but beyond this they can not go. Negligence can not be predicated of omissions to do something outside of and beyond this." (Pp. 458 and 459 of opinion. The italics are ours.)

In the case of the Grand Trunk Ry. Co. *vs.* Ives, reported in 144 U. S. 408, this court announced the following doctrine:

> "As a general rule, it may be said that whether ordinary care or reasonable prudence requires a railroad company to keep a flagman stationed at a crossing that is *especially dangerous*, is a question of fact for the jury to determine, under all the circumstances of the case, and that the omission to station a flagman at a *dangerous crossing may be taken into account as evidence of negligence; although in some cases it has been held that it is a question of law for the court.* It seems, however, that before a jury will be warranted in saying, *in the absence of any statutory direction to that effect*, that a railroad company should keep a flagman or gates at a crossing, *it must be first shown that such crossing is more than ordinarily hazardous;*" (P. 421 of opinion. The italics are ours.)

We have no such case here as that involved in the ruling of this court in the Grand Trunk Railway Company case. There is nothing in the evidence to show that the crossing at 7th Street was specially dangerous; that is to say, that it was one that was more than ordinarily hazardous. Neither was the view of the track obstructed either by the plaintiff in error itself or by other objects proper in themselves at the 7th Street crossing at the time of the accident. The hibiscus did not obstruct the view of the track, because there was no hibiscus where the track crossed the street, and all of those who were present and witnessed the accident saw the engine and cars approaching. We submit that if the facts in the record were sufficient to justify a finding that the crossing was more than ordinarily hazardous and was dangerous, then that issue should have been submitted by the Court to the jury upon proper instructions.

The special instruction requested was to the effect that the jury would not be authorized to base a verdict

against the plaintiff in error solely on the grounds of an omission to keep a flagman at the said crossing or to maintain a gate or other signal device there, *if in every other respect the plaintiff in error had performed its duty.* The action of the court authorized the jury to find a verdict for the defendant in error solely upon the ground that the plaintiff in error had not maintained a flagman or a gate at the crossing.

We submit that the action of the trial court, complained of under assignments of error 3 and 5, was not authorized by the common law and much less by the legislation and jurisprudence of Panama, where the common law is unknown.

FOURTH ASSIGNMENT OF ERROR.

The Circuit Court of Appeals erred in sustaining the ruling of the District Court in respect to that portion of his charge to the jury which bore on the issue of negligence.

The judge's charge to the jury on the subject of negligence was erroneous because it was based on the assumption that the plaintiff in error was guilty of negligence, and that if there was any negligence on the part of the minor, Noel Pigott, it was of a contributory nature only.

We desire to refer to the fact that the injury to the defendant in error was the result of his negligence alone, and that the plaintiff in error was not negligent; that is, according to our theory of the case. This issue is distinct from that which involves the charge of contributory negligence against the defendant in error. A careful reading of the Judge's charge (pp. 92 to 99 of the Transcript of Record) will demonstrate the fact that the jury was not instructed with reference to the issue first named, but that the charge bears entirely upon the issue of contributory negligence. Contributory negligence is based upon the assumption that the party co-

plained of was guilty of negligence. We submit that the plaintiff in error was entitled to an explicit charge to the jury upon the issue submitted by the plaintiff in error, that the latter was without negligence, and that the injury to the defendant in error was due entirely to his own negligence.

It will be noted that plaintiff in error requested Instruction No. 1, as follows:

> "If you find from the evidence that Noel Pigott stepped on the track or ran into the box car after the emergency brakes had been applied by Engineer Neville, then I instruct you that the accident was not the result of defendant's negligence, and your verdict must be for the defendant company."

The Court refused the instruction, and made the following statement in the presence of the jury:

> "Refused. While that is perfectly good law as to an adult, the Court leaves it to the jury to say whether or not the boy, Noel Pigott, used that care and caution that would be expected of a boy of his age."

Evidently, the Court was of the opinion that we were seeking a direction to the jury to determine from the evidence whether the boy was guilty of contributory negligence. The instruction had a distinct purpose, which was to advise the jury that they must absolve the plaintiff in error, if, as a matter of fact, Noel Pigott had stepped on the track or ran into the box car after the emergency brakes had been applied by the engineer. The Judge's main charge, therefore, will indicate that he did not correctly submit our theory of the case to the jury upon the issue of negligence.

SIXTH ASSIGNMENT OF ERROR.

The Circuit Court of Appeals erred in sustaining the action of the trial court in respect to that portion of the

charge which related to the responsibility of empresarios under the laws of Panama:

> 1st. Because the jury were not given in charge all the Panaman law applicable to the case; and,
>
> 2d. Because the Court should have interpreted the Panaman laws and their interpretation should not have been submitted to the jury as an issue of fact.

In respect to the first proposition under this assignment of error, we invite the Court's attention to the fact that the only law of Panama referred to by the Court in its charge to the jury was Article 2341. The jury was told that that article provides, in substance, that the empresarios shall be liable for the negligent acts of their agents and servants. (Pp. 94 and 95 of the Transcript of Record.)

We respectfully submit that the empresarios are not responsible under Article 2341 of the Civil Code of Panama. That article of the code relates to the person who is directly responsible for the act or omission. The trial court made no reference to Articles 2347 and 2349 of the Civil Code, nor to Law 62 of 1887; and no reference was made in the charge to Articles 488 and 489 of the Police Code of Panama, which is the law applicable to the case. The plaintiff in error was entitled to a submission of all of the Panaman law applicable to the case, and the failure of the Court to instruct the jury on the effect of all of the laws of the Republic of Panama was a fundamental error.

It was admitted by counsel for the defendant in error that the Superintendent of the Panama Railroad Company is an expert railroad man, that the engineer and the conductor were expert railroad men and "none better." It therefore appears from the admissions of the defendant in error's counsel that the plaintiff in error had done all that was required of it in the selection of competent, qualified men to operate the train in question

and consequently, the plaintiff in error was relieved of the responsibility by virtue of Article 2347 of the Civil Code, which was not given in the charge to the jury.

We are aware that this court, in the case of the Panama Railroad Company *vs.* Toppin, held that the fact that the empresario had been careful in the selection of his employees was not sufficient to excuse him from liability for acts and omissions of such employees; and the ruling was based upon the decision of the Supreme Court of Justice of Colombia in the case of Cancino *vs.* The Railroad of the North in XIII, *Judicial Gazette*, Nos. 652-653, decided December 16, 1897.

We respectfully submit that the decision in the Cancino case rested upon the fact that the empresario himself was negligent in not taking the necessary precaution to prevent the fire, although he had been previously advised of the burning of several other houses prior to the destruction by fire of the one at issue in that case, and hence the care required in that case was not alone in the selection of employees, but in the adoption of measures to prevent the fire, and this he failed to do. Hence, we find the declaration on the part of the Colombian Court, which is quoted in the Toppin case, that,

> "There is not in the record any proof whatever that any care or precaution, either on the part of the empresario or the engineer, had been taken to prevent the fire, the proof that the empresario on his part had exercised much care in the selection of his employees not being sufficient in the opinion of the court, because the diligence and care here treated of, is that which ought to have been exercised in order to prevent an injury that could have been easily foreseen."

That the want of care was brought home directly to the empresario—General Davila—in the Cancino case, appears from the following statement of the Colombian Court:

"It is perfectly shown in the record that the house destroyed by fire already existed at the side of the road through which the railway was constructed, a circumstance which it is important for the Court to consider, because undoubtedly the aspect of the case would differ notably if the house had been constructed after the establishment of the railway line; and it was easy to foresee that this house as well as the others destroyed by fire, being thatched with straw, were in imminent danger of this fate from sparks thrown out by the locomotives, and that some diligence and care were indispensable in order to avoid it; and there is not in the record any proof whatever that any care or precaution, either on the part of the empresario or the engineer, had been taken to prevent the fire, the proof that the empresario on his part had exercised much care in the selection of his employees not being sufficient, in the opinion of the Court, because the diligence and care here treated of, is that which ought to have been exercised in order to prevent an injury that could have been easily foreseen; and if it is also taken into account that the record shows that the railroad caused the burning of 5 houses in a space of less than 1 kilometer, and this on different dates and at different hours, it must be deduced that not only was there no diligence or care to avoid a repetition of the damage, but that the matter was looked on with a certain amount of indifference; and apropos of this the Tribunal points out that it was not even proved that the locomotive in question was provided with the apparatus known by the name of "spark arrester" (*guarda chispas*), which, though it may not completely prevent the emission of sparks at least diminishes their number and tends to prevent the throwing out of the larger ones."

With all due respect we submit that the decision of the Colombian Court in the Cancino case in no way modifies the Spanish doctrine which has prevailed on the Isth-

mus since the beginning of time, that when it is shown that an employer has exercised due diligence and care in the selection of his servants and in his supervision over them, his responsibility for their acts ceases.

This philosophy of the Spanish law is declared by Dr. José Maria Manresa y Navarro, the great Spanish commentator on the Civil Code of Spain, in discussing the meaning of Article 1903 of the Spanish Civil Code, as follows:

> "Our code has not followed the Italian school, but has been inspired rather in the criterion of the French doctrine inasmuch as it imposes the obligation to repair the damages caused in virtue of a presumption *juris tantum* of fault on the part of the person who has under his authority or dependency the one who caused the damage, derived from the fact that he had not employed due care and diligence over the acts of his subordinates to prevent said result. And so it is that, in accordance with the last paragraph of Article 1903, said responsibility ceases when it is proven that those who are responsible for the acts of others have employed all the diligence of a good father of family. *Therefore, the representation is not the cause of the obligation*, nor is the interest, nor the necessity that there should be someone responsible for the damage caused by one who was irresponsible and without guarantees of solvency to repair the damage done himself, but it is the noncompliance, tacit or supposed, with the duties of precaution and prudence imposed by civil ties that unite the obligated party with the person on whose account he should repair the damage done. For that reason it, the Code, places the obligation among those that come from fault or negligence." (Manresa's Commentaries on the Civil Code of Spain, Vol. 12, pp. 617 and 618. The translation and italics are ours.)

It will thus be seen that the responsibility of the employer does not rest upon the doctrine of agency as at common law; that is to say, the representation is not the cause of the obligation.

That Law 62 of 1887 did not modify Article 2347 of the Civil Code would seem to appear from the statement of the Colombian Court in the Cancino case, as follows:

> "What the legislator undoubtedly wished was to establish a special rule by virtue of which the empresarios of railroads (not the engineers or dependents) should respond for damages caused to persons or their property by reason of the service of the railroads themselves, *a rule which has come to be complementary to that of Article 2347 of the Civil Code.*" (The italics are ours.)

In other words, Article 2347 of the Civil Code is applicable when the damage is due to the act or omission of an employee of the empresario and the latter has not exercised due care and caution in selecting the employees or in his supervision over them, and the law of 1887 is applicable when the act or omission is that of the empresario himself as in the Cancino case. The failure to take measures to prevent fires was General Davila's failure and he failed to take the measures although he knew that his locomotives were causing the burning of houses.

However, the testimony of Doctor Arosemena upon the meaning of the Panaman laws was to the effect that the railroad company was not liable and that the law especially applicable was the Police Code of Panama which fixes the liability upon the conductor primarily, and the administrator, not the empresario, secondarily. The testimony of Mr. Aizpuru on behalf of the defendant in error does not militate against the evidence given by Doctor Arosemena.

Upon the cross-examination of Mr. Aizpuru with reference to the effect of Articles 488 and 489 of the

Police Code of Panama he admitted that the civil responsibility was upon the administrator or the conductor. After he had discussed the penal provisions of the Police Code of Panama, he was asked the question as follows:

> "Q. What does it say about civil liability—who was responsible civilly?"

Mr. Ganson, counsel for the defendant in error, answered for the witness:

> "He says administrator or the conductor.
> Q. Was civilly responsible under this law?
> *Mr. Ganson.* That is what he says, yes." (P. 48 of the Transcript of Record.)

Again, discussing the same law, the witness was asked:

> "Q. But who is civilly responsible, the conductor or the administrator?
> A. Certainly, it says so.
> Q. Isn't that the law of Panama?
> A. Yes, sir." (P. 49 of the Transcript of Record.)

The second proposition under this assignment of error is to the effect that the issue presented is a legal one for the determination of the Court and not one of fact for the determination of the jury.

There is some difference of opinion among the authorities as to the position that foreign laws are to be proved as facts to the jury. Judge Story was of the opinion that the issue in such case was one for the Court. The same view is maintained by the Supreme Court of New Hampshire. (Wharton on the Conflict of Laws. Vol. II, 3d Ed., Parmelee, Sec. 773, p. 1505.) The great weight of authority, however, sustains the proposition that while the fact of a foreign law must be proved to the jury like any other fact, questions of competency and of construction are for the Court. Mr. Wharton, in his

work on conflict of laws, cites a number of decisions of the various courts of the United States to sustain this proposition.

As early as 1816, Justice Washington, sitting in the Circuit Court of Pennsylvania, announced the doctrine that the written or statute laws of foreign countries are to be proved by the laws themselves, when they can be procured; if not, inferior evidence of them may be received. The unwritten laws or usages may be proved by parole evidence, and when proved, it is for the Court to construe them and to decide upon the effect. (Case No. 3128, Vol. 6, Federal Cases.) And the Court of Appeals of the State of New York held that when it becomes necessary to establish the law of a foreign country, it must be proved as facts are proved; but when, after such proof is given, the questions involved depend upon the construction and effect of a statute or judicial opinion, then those questions are for the Court and not questions of fact at all. (Bank of China, Japan, and the Straits, *vs.* Morse, 168 N. Y., p. 458; also reported in L. R. A. 56, p. 139.)

We would also refer the Court to the case of Union Central Life Insurance Company *vs.* Pollard, decided by the Virginia Supreme Court of Appeals, and reported in Lawyers' Reports, Annotated, Book 36, p. 271, wherein it was held that:

> "When the evidence of the law of another State is shown by a copy of a statute, or a part of it, as was done in this case, the question of its interpretation and effect was for the court alone, as in the case of other evidence which consists entirely of writings or documents." (Citing Ennis *vs.* Smith, 55 U. S. 14 How. 400, 14 L. ed. 472; Kline *vs.* Baker, 99 Mass. 255.)

The law of civil procedure of the Canal Zone is substantially a reenactment of the California Code, and

hence the decisions of the Supreme Court of that State in regard to practice and procedure have considerable force in the Canal Zone. It was held by that court in the case of Cummings *vs.* O'Brien, reported in 122 California Reports, page 204, that it was competent to prove as a fact the law of the State of Texas, on which depended the application of the former judgment, though the effect of the law to be proved was a legal question for the Court.

Therefore, we submit that it was the duty of the trial court to construe and apply all of the Panaman law to the facts of the case, and that it was error for the court to leave it to the jury to determine what the legal effect of the Panaman statutes was.

SEVENTH ASSIGNMENT OF ERROR.

The Circuit Court of Appeals erred in affirming the judgment of the trial court.

This assignment of error has been fully covered by what has been said in this brief under the other assignments of errors.

THE PREMISES CONSIDERED, the plaintiff in error respectfully asks that the judgment of the trial court be set aside, and that this court render such judgment in the case as should have been rendered by the court below.

Respectfully,

FRANK FEUILLE,
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Attorneys for the Panama Railroad Company, Plaintiff in Error.

FILED
SEP 30 1920
JAMES D. MAHER,
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1920.

No. [redacted]183

PANAMA RAILROAD COMPANY,
Plaintiff-in-Error,

versus

NOEL PIGOTT, A MINOR, BY HIS GUARDIAN *ad litem*,
GEORGE MORRELL,
Defendant-in-Error.

BRIEF FOR DEFENDANT-IN-ERROR.

THEODORE C. HINCKLEY,
Attorney for Defendant-in-Error.

The Evening Post Job Printing Office, Inc., 154 Nassau St., N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1920.

No. 425.

PANAMA RAILROAD COMPANY,
Plaintiff-in-Error,

VERSUS

NOEL PIGOTT, A MINOR, BY HIS GUARDIAN *ad litem*,
GEORGE MORRELL,
Defendant-in-Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

The record in this cause discloses that it was tried by the *nisi prius* court no less than three times. Defendant-in-error, a minor, lost his leg near the hip as a result of a freight-car passing over it. The opinion of the Circuit Court of Appeals, in part, states:

> "The Plaintiff-in-error now brings this case to this court on writ of error, and is asking that the judgment of the trial court be set aside for the reasons stated in plaintiff-in-error's assignments of error.
>
> Then follow some thirteen assignments of

error, complaining of the trial court's refusal to grant a continuance; to grant a new trial; and to direct a verdict for the plaintiff-in-error; also refusing special instructions requested, and complaining of instructions given to the jury on the merits of the case.

We have carefully considered all the assignments of error in the light of the elaborate briefs presented in the case, and conclude that none of the assignments of error present any reversible error.

The motion for a directed verdict was properly refused, because the evidence in the case as to the negligence of the plaintiff-in-error and contributory negligence on the part of the minor, Noel Pigott, was conflicting and not only warranted but required a submission of the case to the jury.

The vital questions involved in this case as to the claimed construction of the laws of Panama have been settled in this and the Supreme Court adversely to the contention of the plaintiff-in-error: See *Panama Railroad Company* v. *Bosse*, 239 F. 303, recently affirmed in the Supreme Court at the present term; *Panama Railroad Company* v. *Toppin*, 250 F. 989; *Railroad Company* v. *Gladmon*, 15 Wall. 401; and *Grand Trunk Railway Co.* v. *Ives*, 144 U. S. 408."

Panama Railway Co. v. *Pigott*, 256 F. 837.

Plaintiff-in-error specifies seven assignments, but apparently abandoning the fifth same warrants no consideration. The more important of plaintiff-in-error's assignments having received late constructions by this court, a full reply to same becomes unnecessary.

As to the First Assignment of Error.

The evidence disclosed (pp. 31-52, Transcript of Record), that there were sufficient facts to warrant the trial court in allowing the question of negligence to go to the jury; it also disclosed that the child, Noel Pigott,

was injured as a result of the failure on the part of the company to perform a duty it owed him; there was also sufficient evidence to justify the Court *a qua* in submitting all questions of negligence, contributory or otherwise, for the jury's consideration.

Such being the case, manifestly it was not error for the trial court to pass adversely on plaintiff-in-error's motion for a directed verdict.

Plaintiff-in-error insists that under the Law of the Republic of Panama, it is not liable in an action of this nature because the evidence failed to show that the engineer and conductor employed by it were not competent servants. In this he is mistaken.

Panama Railroad Company v. *Toppin*, 252 U. S. 308.

Article 2341, Civil Code of the Republic of Panama.

Defendant-in-error introduced in evidence Law 62 of 1887 of the Republic of Colombia which was in force and effect in Panama on the date that defendant-in-error was injured. This law reads as follows:

> "Art. 1. The occupancy of public roads with railroads is prohibited.
>
> "Notwithstanding such prohibition the government may enter into a contract with the empresario of a railroad by means of which the railroad may use the portion of the public road that may be indispensible, upon the payment of previous indemnifications, along in such places where by reason of the brokenness of the ground it becomes necessary to occupy a part of the public road.
>
> "Art II. Railroad enterprises are obliged to conveniently establish the service of the public roads which they cross in such a manner that the traffic over the highway may not be interrupted OR RENDERED DANGEROUS BY SUCH RAILROAD

crossings. They must take like precautions in respect to private roads when the crossing is made on a level therewith.

"Art. III. Whenever it becomes necessary to cross a public road, in the construction of a railroad, permission shall be asked of the minister of fomento, in order that this official may decide whether it is proper or not to grant the permit and that he may order what shall be done for the safety of the transit.

"Art. IV. The empresarios of railroads are responsible for the damages and injuries which are caused to persons or properties by reason of the service of the said roads and which may be imputable to negligence or violations of the public rules applicable, which the government shall issue as soon as the present law may become effective." (Italics ours.)

The evidence disclosed that there were no gates maintained by the plaintiff-in-error and that no flagman or watchman was stationed at this public crossing, and furthermore that a view of the tracks was obstructed by a row of hibiscus bushes, planted by the plaintiff-in-error, on either side of its tracks and alongside the sidewalks approaching the tracks. Therefore it was proper for the jury to be permitted to find whether or not the plaintiff-in-error, in the light of these facts, had complied with the provisions of the law last quoted. If the traffic over this public highway was rendered dangerous by reason of the failure of the plaintiff-in-error to offer sufficient protection to pedestrians, then, in accordance with Article IV, it might properly be held "responsible for damages and injuries" sustained by the defendant-in-error.

Furthermore there was ample proof that an employe of the defendant company was negligent. Defendant-in-error's witnesses testified that there was no employe of the company on the front end of the leading freight car that

was being pushed by the engine across this public street. Rule 102 of the company provides:

> "When cars are being pushed by an engine (except when shifting and making up trains in yards) a brakeman must take a conspicuous position on the front end of the leading car."

The brakeman himself, Domingo Charres, testified (p. 67, Transcript of Record), that he was "about the middle of the box car". The jury was therefore justified in finding that had this brakeman been "in a conspicuous position on the front end of the leading car", he would have been able to have warned the plaintiff in time to prevent the injury.

Plaintiff-in-error, under this assignment, further urges that since the statute did not specifically require that railroad companies maintain flagmen, watchmen or gates at public crossings, the jury should not have been permitted to take this matter into consideration. In this connection the court's attention is invited to a reading of the case of *Grand Trunk Railway Co.* v. *Ives*, 144 U. S. 408, in which case (pp. 421 and 422 of opinion), the court states:

> "As a general rule, it may be said that whether ordinary care or reasonable prudence requires a railroad company to keep a flagman stationed at a crossing that is particularly dangerous, is a question of fact for the jury to determine, under all the circumstances of the case, and that the omission to station a flagman at a dangerous crossing may be taken into account as evidence of negligence; although in some cases it has been held that it is a question for the court."

In this respect, Thomas Pigott, father of the defendant-in-error, testified (p. 36, Transcript), as follows:

> "The corner of 7th and Broadway is a populous thoroughfare. There are many people passing over that crossing, and there are a great many children who play there, especially in the evenings. By evening I mean around four o'clock."

Adina McCormack testified (p. 37, Transcript), as follows:

> "This crossing is a place where many people congregate. There are children to be seen there at all times."

Emily Kidd testified (p. 41, Transcript), as follows:

> "During the time I have lived in the neighborhood I have not seen a flagman at 7th and Broadway, to warn the pedestrians or passersby. There are no gates there. It is rather a populous place. There are many people there for it is a crossing street. There are plenty of children there, and the Broadway and American Theaters are there also."

There was ample testimony that this crossing at Seventh and Broadway was in a thickly populated portion of the City of Colon, and that many people passed there, and many children played there, which necessarily rendered the crossing more than ordinarily hazardous. Furthermore there was evidence to the effect that the view of the track was obstructed by the rows of hibiscus planted on either side of the track by the plaintiff-in-error.

In the light of these facts the court was justified in following the rule as laid down in the case last cited and properly submitted to the jury for its consideration whether or not the plaintiff-in-error was negligent in this respect. In fact it was necessary that these matters be submitted to the jury in order that it might decide whether or not the plaintiff-in-error had violated the provisions of Art. II of Law 62 of 1887, heretofore quoted, which is already familiar to this court.

Plaintiff-in-error further insists, under this assignment, that the motion for a directed verdict should have been granted upon the following grounds:

> 3. Because the evidence shows that the said minor, Noel Pigott, was injured as a result of his own negligence and want of care.

4. Because the evidence in the case does not authorize the jury to find affirmatively that the said minor, Noel Pigott, was free from fault which contributed to the accident causing the injuries.

In other words plaintiff-in-error urges that the trial court should have usurped the functions of the jury and have decided the disputed facts. There was evidence to the effect that on the date of the injury to this child that there were rows of hibiscus five feet eight inches in height planted by the company on either side of the track at the crossing and also along the side of the sidewalk on which the defendant-in-error was walking in order to cross the track. As heretofore stated there were no gates at the crossing and no flagman or watchman stationed there. There was also evidence to the effect that the brakeman was not in a position at the front end of the leading car as required by the rules of the company. Likewise the witnesses for defendant-in-error testified that they heard no bell being rung as the train approached the crossing. Manifestly the evidence is such that different minds might reasonably have drawn different conclusions as to whether or not the defendant-in-error was guilty of any contributory negligence at all, and under such circumstances the evidence should invariably be submitted to the jury.

Wellers v. *Railway Co.*, 120 Mo. 635;
Brooks v. *Somerville*, 106 Mass. 271.

The fact that the defendant-in-error was, at the time of his injury a minor, seven years of age, made it incumbent upon the trial court to submit the question of contributory negligence to the jury.

Railroad Company v. *Gladman*, 15 Wall. 401;
Crane Elevator Co. v. *Lippert*, 63 Fed. 942.

Therefore the jury in the instant case having found that the defendant-in-error was not guilty of such contributory negligence as to bar his right of recovery, same becomes final.

As to the Second Assignment of Error.

The trial court was justified in refusing the request of plaintiff-in-error relative to not allowing this defendant-in-error to recover in damages for pain and suffering. In the following cases this court has established [redacted] rule:

Panama Railway Co. v. *Bosse*, 249 U. S. 41.
Panama Railway Co. v. *Toppin*, 252 U. S. 308.
Panama Railway Co. v. *Beckford*, 231 Fed. 436.

As to the Third Assignment of Error.

The matters urged by plaintiff-in-error under this assignment have already been commented upon in replying to the first assignment of error. A reading of the charge to the jury as given by the trial court in this respect will demonstrate that same was proper (pp. 95 to 97, Transcript). It was for the jury to determine whether or not the plaintiff-in-error had violated the provisions of Article II of Law 62 of 1887 in failing to maintain gates, or to employ a flagman or switchman at this public crossing.

As to the Fourth Assignment of Error.

Plaintiff-in-error urges that the trial court erred in refusing to give to the jury the following instruction:

> "If you find from the evidence that Noel Pigott stepped on the track or ran into the box car after the emergency brakes had been applied by engineer Neville, then I instruct you that the accident was not the result of defendant's negligence, and your verdict must be for the defendant company."

In refusing to give this instruction the Court stated as follows:

> "Refused. While that is perfectly good law as to an adult, the Court leaves it to the jury to say

whether or not the boy, Noel Pigott, used that care and caution that would be expected of a boy of his age."

The request for the special charge above quoted practically amounted to a request for a directed verdict, and it further failed to allow the jury to take into consideration the age and mental capacity of the defendant-in-error.

This matter of contributory negligence was fully covered by the Court in its charge to the jury, as follows:

"Now gentlemen, if you find that the railroad company was not negligent in any of those respects mentioned, in the manner of operating its train, in its speed, in the ringing of the bell, and in the failure to maintain flagman or gates at that point, then that settles your deliberations, and your verdict should be for the defendant. If you find that it has measured up to the standard of proper care and prudence in these respects, then your verdict should be for the defendant. If, however, you find that under the laws of the Republic of Panama a recovery is permitted under such circumstances, and if you find that the railroad was guilty of negligence in any one of the instances specified by the plaintiffs and that the injury was the result of such failure of care or prudence, if any such you so find, then the next question for you to determine is 'was the boy, Noel Pigott, himself guilty of negligence' because the law is that notwithstanding the negligence of a defendant, it is not liable to respond in damages if the party himself was guilty of negligence which directly contributed thereto, or that the injury was the result of the joint concurring negligence of the two together. Now, if you find that the defendant was guilty of negligence, then you are next to consider 'was the boy himself guilty of negligence, and did he fail to exercise that degree of care for his own protection that he should have done at the time and place', that is, ordinary care and prudence which is required of a person ap-

proaching a railroad crossing to exercise his own faculties, his own senses. It is generally expressed in the words 'Stop, Look, and Listen'. To stop, to look, and to listen for the approach of a train. And if by the exercise of those senses he could have seen the approach of the train and avoided the accident, the law does not permit a recovery, although you may find that the defendant was guilty of negligence in the manner of operating its train, or in their failure to maintain gates or flagmen.

"Now, that is the general proposition, but there is another proposition that it is just and fair that I should give you, and that is that the law does not require so high a standard of care and prudence on the part of an infant as it does of an adult. While the standard, as I have heretofore given to you, is that required of an adult, the law is much more lenient or tender in its dealing with an infant. The law expects and knows that children of immature years are liable to act upon childish impulses and instincts, and therefore, the law says that in assuming whether or not an infant has been guilty of contributory negligence or not you are to fix in your mind what would be ordinarily required—what would be expected of a child of the age of the one injured; and if he measures up to the degree of care and prudence that you would ordinarily expect from one of his age and condition, then he is not guilty of contributory negligence, although it might be very negligent on the part of an adult. But if he failed to do, or if he does what ought not to be done by one of his age and injury results, then and in that event he is guilty of contributory negligence, and no recovery can be had, notwithstanding the defendant himself was guilty of negligence. Now, that is the principle of law. You are to consider that this boy was some six or seven years of age. Fix in your mind what a boy of that age should be expected to do, how he should act, and then see if he failed in that respect. Something, in fact, much has been said about the fact that he was allowed by his parents to go to school and on errands, and that being allowed to go on errands

it must be supposed that he was perfectly capable of taking care of himself. Now, as to whether he was guilty of negligence or not, you must consider the entire evidence. Some say that he was going home along the street on the north side along the hibiscus hedge, and in such a way that he could not see the approach of the train—and on the other hand there is much evidence to the effect that he was going along the south side and that as to a train coming from the north the hibiscus hedge did not constitute any obstruction to the boy, and that he went caticornered across the street into the danger. That is a fact for you to determine, whether he went along on the south side or the north side, and how he did act, and every fact and circumstance connected with it, and then say whether in attempting to cross he measured up to the standard that you as sensible men may fix in your mind for a child of his age" (pp. 97-99, Transcript).

In the case of *Gladman* vs. *the Washington and Georgetown Railroad,* 15 Wall. 401; 21 Law. Ed. N. S. 114, wherein, the plaintiff, a child of the age of seven years, while crossing a street in Georgetown, was injured by the cars of the company, the Court (*l. c.* 116) stated:

"The rule of law in regard to the negligence of an adult and the rule in regard to that of an infant of tender years is quite different. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. If he fails to give it, his injury is the result of his own folly, and cannot be visited upon another. Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. Of a child of three years of age less caution would be required than of one of seven; and of a child of seven less than of one of twelve or fifteen. The caution required is according to the maturity and capacity of the child and this is to be determined in

each case by the circumstances of that case. *Shear & Red. Neg.* 49; *Morgan* v. *Brooklyn City R.* 38 N. Y. 455; *Smith* v. *O'Connor*, 48 Pa. 218; *Pennsylvania Railroad* vs. *McTighe*, 46 Pa. 316."

The last case above cited, in so far as concerns the proposition of contributory negligence is practically identical with the instant case and the citation effectually disposes of plaintiff-in-error's contention.

As to the Sixth and Seventh Assignments of Error.

The expression of this court in the case of *Panama Railroad Company* v. *Toppin*, 252 U. S., 308, seems to fully dispose of this assignment.

Plaintiff-in-error insists that an interpretation of all the laws of Panama applicable to this subject was for the Court and not the jury. The transcript of the record shows that the jury was fully enlightened, or at least an attempt on behalf of both counsel was made to fully enlighten it on all the laws of the Republic of Panama applicable to the instant case. In fact the record discloses that so much time was consumed in proving what the laws of Panama did and did not disclose that the main issues were almost forgotten. If there was error in this respect, manifestly it was in favor of the plaintiff-in-error, for the laws of Panama which were proven as a fact at the trial, could by the trial court only have been construed as holding that empresarios of railroads are liable to third persons who may be injured as a result of a violation of the provisions thereof, and the Court *a qua* might properly have charged the jury to this effect. In permitting the jury to determine the meaning of these laws, the trial Court clearly favored the plaintiff-in-error and the latter therefore should now have no cause for complaint.

The Seventh Assignment is without argument or law to support it and merely states that the Court *a quo* erred in overruling plaintiff-in-error's motion for a new trial. It is elementary that the ruling of the trial Court in granting or overruling a motion for a new trial will not be considered by federal Appellate Courts on writ of error.

Defendant in error respectfully insists that the opinion of the Circuit Court of Appeals be sustained.

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